No. 98-____ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RACHEL HICKERSON, DEREK JONES,
TY MCCONNELL and ELLIOT STAMLER,

Petitioners,

—v.—

THE CITY OF NEW YORK, RUDOLPH W. GIULIANI, as Mayor of the City of New York, GASTON SILVA, as Commissioner of the Department of Buildings of the City of New York, and JOSEPH B. ROSE, as Director of the Department of City Planning of the City of New York,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT and CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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78 pp

QUESTIONS PRESENTED

1. Whether the Second Circuit fundamentally misconstrued this Court's decisions in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), when it upheld New York City's adult zoning ordinance without requiring the City to demonstrate the actual existence of reasonable alternative locations for the numerous First Amendment enterprises forced to relocate or close in direct conflict with the approach taken by the Ninth and Fifth Circuits in similar cases?

2. Whether the courts below erroneously denied petitioners' request for injunctive relief upon the ground that petitioners' First Amendment claims would be barred by principles of collateral estoppel in disregard of the standard identified by this Court in Montana v. United States, 440 U.S. 147 (1979)?

PARTIES TO THE PROCEEDING

With the exception of the intervenors, the caption of the case contains the names of all the parties to the proceeding. In addition to Times Square Business Improvement District and Center for the Community Interest, the other Intervenors are:

Bellaire/Bell-Ville Civic Association, Bnos Israel Girls' School, Bowne Park Civic Association, Briarwood Community Association, Bronx Community Board # 12, Brooklyn Civic Council, Brooklyn Tenants Council, Cardinal Spellman High School, Coalition of United Residents for a Safer Environment, College Point Board of Trade, Committee for a Better and Safer Nostrand Avenue, Communities of Maspeth and Elmhurst Together, Community School District 21 Presidents' Council, Congregation Bnai Shloima Zalman, Crown Heights Taxpayers and Civic Association, Douglaston Civic Association, East Midwood Neighborhood Association, Councilmember Andrew Eristoff, Grand Central Partnership, Holliswood Civic Association, Hudde Junior High School Parents Association, Jackson Heights Community Development Corporation, Kings Highway District Management Association, Kingsway Jewish Center; Lawyers' Committee on Violence, Manhattan Terrace Civic Association, Councilmember Helen Marshall, Midwood Civic Action Council Inc., Northern Boulevard Business Association, Northern Boulevard Merchants' Association, 100-299 East 77th Street Block Association, Prospect Park Yeshiva, Queens Braddock Civic Association, Queens Village Civic Association, Real Estate Board of New York, Residents Against Street Prostitution, Rosedale Block Association, Rosedale Civic Association, Councilmember John Sabini, 34th Street Partnership, United Civic Council of Queens, United Community

Civic Association, Councilmember Anthony Weiner, West 45th Street Block Association, West 47th/West 48th Street Block Association and West 90's/West 100's Neighborhood Coalition.

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Rachel Hickerson, Derek Jones, Ty McConnell and Elliot Stamler respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS ENTERED IN CASE

The order of the Second Circuit denying rehearing is unreported. App. 1a. The opinion of the Second Circuit is reported at 146 F.3d 99. App. 4a. The opinions of the U.S. District Court for the Southern District of New York are reported at 997 F. Supp. 418 and 932 F. Supp. 550. App. 32a and 45a. The opinion of the New York Court of Appeals is reported at 91 N.Y.2d 382. App. 65a. The opinion of the New York Appellate Division, First Department is reported at 241 A.D.2d 360. App. 92a. The opinion of the New York Supreme Court is reported at 171 Misc.2d 376. App. 95a.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution appears in the App. at 123a. Article I, § 8 to the New York State Constitution appears in the App. at 123a. Amendment N 950384 ZRY to the Zoning Resolution of the City of New York appears in the App. at 124a.

BASIS FOR JURISDICTION IN THIS COURT

On July 9, 1998, the Second Circuit denied petitioners' timely petition for rehearing. App. 1a. The judgment sought to be reviewed was entered on June 3, 1998. App. 4a. This Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners are customers of "adult businesses" and adult entertainment in New York City, who have challenged a New York City zoning ordinance, alleging that the zoning regime adopted by the City of New York with respect to adult establishments will substantially and unconstitutionally restrict petitioners' access to adult entertainment. Petitioners contend that the zoning ordinance violates their First Amendment rights and that the court below misapplied the standards set forth by this Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), which require, inter alia, that a municipality seeking to regulate adult book stores, theaters and places of entertainment must demonstrate that the enactment "allows for reasonable alternative avenues of communication." The Courts of Appeals for the Fifth and the Ninth Circuits properly apply this Court's standards by requiring municipalities seeking to restrict adult businesses to demonstrate that alternative locations are suitable for and accessible to adult businesses as a realistic and practical matter. In this case, the Second Circuit upheld New York City's enactment without any such showing.

Petitioners also contend that the lower federal courts erroneously denied their request for preliminary injunctive relief on the ground that petitioners' First Amendment claims would ultimately be barred by principles of collateral estoppel, in disregard of the standards articulated by this Court in Montana v. United States, 440 U.S. 147 (1979).

Factual Background

In 1995, the City of New York adopted a zoning regime with respect to adult entertainment establishments. App. 124a. The City conceded that only 28 existing adult businesses

would be permitted to remain at their current locations after the zoning enactment is implemented. (J.A. 989).[1] Accordingly, more than 84% of the 177 then-existing adult establishments would be required to move or to close or to otherwise change the nature of their businesses. (J.A. 989).

City officials asserted, however, that the new zoning enactment will leave more than 500 parcels of land available for the re-location of the approximately 150 businesses that were to be required to move. (J.A. 989).

Yet this estimate rested upon an abstract and theoretical methodology that did not involve the identification of any specific parcels of land that were supposedly available and that failed entirely to consider whether any specific parcels were actually suitable.[2] Indeed, the City conceded that it never conducted a parcel-by-parcel examination of any actual sites. Moreover, the City's claim that more than 500 sites would be available for the relocation of adult businesses was seriously refuted by declarations against interest made by defendant Rudolph Giuliani immediately after the New York Court of Appeals rendered its decision on petitioners' state constitutional claims in February 1998. Mayor Giuliani announced, at that time, that no more than 20 or 30 adult businesses would survive under the new zoning plan because

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[1] References preceded by "J.A." are citations to the Joint Appendix filed by petitioners and petitioners in Amsterdam Video et al. v. City of New York et al. in the Second Circuit.

[2] As is more fully discussed below, City officials arrived at this projection by placing a dot on the line of a zoning map demarcating the residential zones and then measuring a distance of 500 feet from that dot outside the residential zones and then continuing to identify dots on the map each 500 feet from the previous dots. This process was undertaken without considering -- or examining -- the realistic suitability of the projected alternative sites. (J.A. 852).

relocation sites for adult establishments have been "severely limited."

In late July, 1998, after this Court rejected an emergency stay application brought on by the Amsterdam Video petitioners, the City began to enforce the adult zoning ordinance. To date, nearly 50 adult businesses[3/] have closed and either gone out of business altogether or have substantially altered the nature of their businesses -- abandoning the business of adult entertainment completely or reducing the quantity of their adult entertainment business to less than 40% of the total volume of any such business.[4/] The City has indicated that it will continue to pursue aggressive enforcement activities to force additional closures or substantial changes in the nature of the businesses' operations.

Proceedings Below

Petitioners' request for injunctive relief in the federal courts followed a rejection, by the New York State Court of Appeals, of petitioners' state constitutional challenge to New York City's zoning enactment. App. 65a.

[3/] As was reported in the September 29, 1998 edition of *The Christian Science Monitor*, 21 businesses closed voluntarily in late July after the City began to enforce the zoning enactment. The City has pursued aggressive enforcement activity against another 29 businesses.

[4/] Pursuant to City-issued enforcement guidelines, to come into compliance with the zoning enactment, a business must reduce its stock of adult materials to less than 40% of their overall stock-in-trade. These enforcement guidelines are the subject of on-going litigations in the State Supreme Courts of the five counties that comprise New York City and in appeals filed in two of the New York State Appellate Divisions.

A. Removal and Remand

Petitioners' suit challenging the New York City zoning enactment on state as well as federal constitutional grounds was initially filed in Supreme Court, New York County.[5/] The City petitioned to remove the case to federal District Court (J.A. 167-168). In a decision rendered in June 1996, the District Court concluded that abstention under Railroad Commission v. Pullman Company, 312 U.S. 496 (1941) was appropriate and remanded the case to the state courts to adjudicate petitioners' state constitutional claims. App. 45a. The District Court retained jurisdiction of petitioners' federal constitutional claims but stayed all proceedings in the federal Court pending the disposition of petitioners' state constitutional challenge in the state courts. App. 64a. Upon remand of petitioners' state constitutional claims to the state court, petitioners filed a statement in the state court, pursuant to England v. Louisiana Board of Examiners, 375 U.S. 411 (1964), expressly reserving their right to return to federal court in order to litigate their federal constitutional claim in a federal forum and announcing their intent to present to the state court only those claims arising under Article I, § 8 of the New York State Constitution. (J.A. 312-315).

B. New York State Court Proceedings

In the State Supreme Court for New York County, the

[5/] Over 100 owners and operators of adult establishments simultaneously commenced a companion case in Supreme Court for the State of New York, County of New York bearing the caption "Amsterdam Video et al. v. City of New York et al. In both the state court proceedings and in the federal court proceedings, the Amsterdam Video case has been administratively consolidated with the Hickerson case.

case was assigned to Justice Marilyn G. Diamond (J.A. 826).[6] On July 23, 1996, shortly after the case was remanded from the District Court to the State Supreme Court, petitioners served discovery requests on defendants. (J.A. 826-27). Such discovery was directed at three critical issues in this case, including what specific parcels of land will remain available, under the zoning enactment, for the relocation of adult businesses.

On August 12, 1996, defendants responded to one of petitioners' interrogatories, answering that "Defendants have never identified or determined the locations of available adult establishment receptor sites in New York City under the Amended Zoning Resolution" (J.A. 407).[7] Because the City's interrogatory answers never identified any specific

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[6] Justice Diamond treated the case as one that was consolidated with Amsterdam Video and a third case, Stringfellow's Ltd. v. City of New York et al. 95a. Justice Diamond further permitted 47 additional parties, comprising the Times Square Business Improvement District and the Center for the Community Interest, then named the American Alliance for Rights and Responsibilities, and 45 other community groups, business organizations and local elected officials to intervene in all three cases (J.A. 826).

[7] This answer conformed with the statement by Albert Fredericks, Assistant Corporation Counsel, in a colloquy with Justice Diamond at a conference with the Court on August 6, 1996.

> The Court: How did you identify these 500?
>
> Mr. Fredericks: What we did is we took a map, and basically the people at City Planning, we took a map and looked at all the districts where this is allowed, and we'll give you maps, and then we simply started going along the map streets ... measuring every 500 feet ... this was an in-house calculation that was done. I'll ask City Planning if they have anything, but this was not -- we never produced or published a map that said here are the 514 sites.

parcels of land that would be available for the relocation of adult businesses and, perforce, never provided any evidence of the practical suitability or accessibility of any specific sites, petitioners sought further discovery on the issue of alternative locations. (J.A. 827). On August 16, 1996, however, Justice Diamond entered an order staying all discovery in the proceedings.

On August 22, 1996, Justice Diamond agreed to permit petitioners to conduct a single deposition of Marilyn Mammano, an official from the Department of City Planning ("DCP"). The scope of questioning at that deposition was limited, however, to the method by which the City estimated that 500 sites would be available for adult businesses under the zoning enactment. (J.A. 827). Ms. Mammano conceded, at that deposition, that the City's calculation of 500 available locations rested upon an entirely fanciful exercise that projected the abstract possibility of 500 sites at intervals of 500 feet but that never even identified the locations of any of these sites.[9/]

[9/] When questioned as to how the defendants calculated the number of adult businesses that could locate within the five boroughs of New York City, Ms. Mammano testified that personnel in the DCP, under her direct supervision, essentially engaged in a two-step process. First, DCP personnel entered various programming instructions into a computer program generating DCP maps for each borough, which presented, on a tax-lot basis, the districts where adult businesses would be permitted (J.A. 861, 865). Although a street grid appeared on each map, no identifying street names or neighborhood landmarks appeared on the maps and the maps were generated on a scale that made identification of exact site locations difficult, if not impossible (J.A. 864).

Second, DCP personnel took those maps and manually measured out with a compass/scale device, in the districts where adult businesses would be permitted, distances of 500 feet and placed imaginary "dots" at those

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Nevertheless, on the basis of this abstract calculation, the City moved for summary judgment and claimed that its zoning enactment provided ample alternative sites for the relocation of the nearly 150 businesses that would be required to move. It advanced this claim without identifying any specific parcels of land. And it advanced this claim despite the fact that it was clear -- from even the most obvious examination -- that much of the area that the City claimed was available, in fact, was unlikely ever to be rendered accessible to adult businesses.[2/]

[1/](...continued)
500 foot intervals. Each "dot" represented a potential location for an adult establishment. According to Ms. Mammano, the total number of "dots" came to more than 500. Ms. Mammano stated:

"Then what we did is took a 500-foot distance on a scale, and we actually laid out physically along the road system, and again only along the road system that we knew to be available. Not calculating additional roads and additional subdivisions which could have been accomplished. And we simply placed potentially at 500-foot intervals marks which indicated potential sites for adult establishments within the zones that they would be permitted, taking into account all of the locational buffer restrictions, sensitive receptors, et cetera. That is how it was produced ...[it] was not the purpose of the exercise, to be site specific. It was only to give an estimate of the total number, not the site specifics." (J.A. 852).

[2/] Parcels of land that, according to the City, were available in Manhattan for relocation by adult businesses included those currently occupied by the Jacob Javits Convention Center, the Gansevoort Meat Market, the U.S. Post Office Chelsea Distribution Facility, Manhattan's Flower District, the Chinese Consulate, portions of the Hilton Hotel, the Equitable Center, the Time Life Building, the NBC/Today Show studios, the Rockefeller Center Complex, Macy's and City Hall Park. Other sites are occupied by structures entirely unsuitable for retail operations, including Bronx Terminal Market, Hunts Point Sewage Treatment Plant, Brooklyn Navy Yard, Red Hook Container Port, Long Island Rail Road Jamaica Train Yards, Fresh Kills Landfill, Port Mobil and Arthur Kill Correctional Facility. Many of the remaining sites suggested by the City lack
(continued...)

Despite the highly speculative and unrealistic nature of the City's calculation, the State Supreme Court Justice concluded that defendants had met their burden of demonstrating ample alternative locations for adult businesses. This conclusion was critical to the disposition of the state constitutional claims. The State Supreme Court further concluded that the "predominant purpose" of City officials in enacting the zoning measure was not to restrict sexually explicit expression because of its offensiveness to many people and that the zoning law was adopted because of the "adverse secondary effects" of such businesses.[10/] And on the basis of these conclusions, Justice Diamond granted the City's motion for summary judgment and dismissed petitioners' state constitutional claims. The State Supreme Court decision

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[9/](...continued)
appropriate infrastructure, including public transportation and sidewalk and road access to make retain operations possible. Such areas include Staten Island's Island of Meadow and Shooter's Island Bird Sanctuaries, as well as the Clay Pit Ponds State Park Preserve in Staten Island and the Con Rail/Amtrak/Metro North rights of way along the Hudson River in upper Manhattan and the Bronx. (J.A. 837-42).

[10/] This conclusion was reached despite the fact that the trial court permitted no depositions and no significant factual inquiry into the purposes underlying the City's enactment; and despite the fact that the New York City Department of City Planning attempted to examine whether adult businesses caused "adverse secondary effects" and was forced to concede that its study "did not yield conclusive evidence of a direct relationship between the adult use and the urban ills affecting the community." (J.A. 843); and despite the fact that two other studies of "adverse secondary effects" with respect to New York City communities were similarly inconclusive. (J.A. 843). Nevertheless, Justice Diamond granted summary judgment to the City on these issues, without serious discovery and without any evidentiary hearing and even though material disputes of fact existed with respect to the "adverse secondary effects" issue just as they existed with respect to the City's claim of ample alternative locations.

issued on October 23, 1996. App. 95a.[11/] This decision was affirmed, in summary fashion, by the Appellate Division, First Department on July 17, 1997. 92a. And on February 24, 1998, the New York Court of Appeals affirmed the lower court decision. App. 65a.

In response to the New York Court of Appeals decision, Mayor Rudolph Giuliani provided new and additional grounds to suspect the accuracy of the City's claim that the zoning enactment provided reasonable alternative locations for adult businesses. On the day that the New York Court of Appeals decision was released, the Mayor announced that the "places

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[11/] On October 24, 1996, the Appellate Division, First Department stayed enforcement of the zoning enactment and granted an interim stay of the State Supreme Court's order and judgment pending appeal. On October 31, 1996, defendants entered into a stipulation with plaintiffs agreeing to extend the Appellate Division's interim order, staying enforcement of the zoning enactment, as well as the State Supreme Court's order and judgment, in accordance with the provisions of New York CPLR § 5519(e). The stay, therefore, remained in effect through the disposition of the state law claims by the new York Court of Appeals.

On return of the case to federal court, the District Court stayed enforcement of the Zoning Resolution (J.A. 1253). And, on appeal to the Second Circuit, a further stay was issued by that Court (J.A. 1264-65). The Second Circuit vacated that stay and ordered immediate issuance of the mandate in the Hickerson proceedings on June 3, 1998. App. 32a. The stay remained in effect and the issuance of the mandate was stayed pending the disposition of petitioners' petition for rehearing. When the petition was denied on July 9, 1998 (App. 1a), the stay was vacated and the mandate issued on July 16, 1998. A corrected mandate was issued on July 21, 1998. The Amsterdam Video petitioners unsuccessfully pursued emergency applications for stay of the mandate in their proceeding with both the Second Circuit and this Court. This Court rejected the Amsterdam Video petition on or about July 29, 1998. The City immediately began to enforce the zoning enactment, bringing numerous ex parte nuisance abatement proceedings against owners and operators of adult businesses in the five boroughs.

[adult businesses] can relocate are severely limited ... our eventual analysis of it is that [the Zoning Resolution] will reduce the number [of adult businesses] in the City to something like 20 or 30, whereas previously there had been over 200 ... what we did -- and I think it was very artful ... we pushed to the limit and left a small amount of space that is available. The end result will be dramatically fewer sex shops and porn shops in the City...." (J.A. 913-14).

C. Proceedings in the District Court

On February 27, 1998, petitioners returned to federal court to adjudicate their federal constitutional claims and sought a stay of the enforcement of the zoning enactment and preliminary injunctive relief maintaining the status quo pending further litigation in the case.

Judge Cedarbaum, U.S.D.J., granted the Hickerson and Amsterdam Video petitioners' application for a temporary restraining order pending a hearing on petitioners' motion for preliminary injunctive relief.[12/] Judge Cedarbaum further directed that the parties file any "new" evidence with her chambers no later than close of business on Wednesday, March 4, 1998 and, further, that the parties file supplemental papers no later than March 5, 1998 at noon.

The Hickerson petitioners filed with the District Court on March 4, 1998 a videotape of segments of Mayor Rudolph Giuliani's February 24, 1998 daily news conference carried on the New York City owned and operated cable television station, Crosswalks, at which he responded to questions with

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[12/] Judge Cedarbaum also granted the renewed application of TSBID for permission to intervene in these actions. Judge Cedarbaum subsequently also granted the renewed intervention application of CCI and some 45 other community groups, business organizations and local elected officials.

respect to the impact of the adult zoning ordinance on adult establishments in New York City (J.A. 913). Petitioners also provided a copy of the transcript to the Court on March 7, 1998 (J.A. 914). As noted above, at that press conference, defendant Giuliani announced that as a result of the City's artful manipulation of the permissible zoning locations, only 20-30 establishments will be left in New York City after the zoning enactment is enforced.

The Amsterdam Video petitioners filed with the Court on March 6, 1998, inter alia, the supplemental affidavit of R. Bruce McLaughlin, a nationally recognized land use expert retained by the Amsterdam Video petitioners (J.A. 1019-1231). In that affidavit, Mr. McLaughlin noted that there were 177 existing adult uses in the City, of which 147 would be required to close, move or alter the nature of their existing business operations to conform with the requirements of the zoning ordinance (J.A. 1032). He further indicated, in that affidavit, that it was his estimate that no more than 90 potential sites would exist in the five boroughs of New York City under the adult zoning enactment. (J.A. 1033).

After oral argument was conducted on March 6, 1998, Judge Cedarbaum denied petitioners' application for a preliminary injunction but stayed her order until the close of business on March 11 "so that petitioners can promptly seek from the Second Circuit a stay pending appeal." (J.A. 1253). The District Court's denial of preliminary injunctive relief in this case rested upon the conclusion that the questions adjudicated by the New York State courts with respect to the state Constitution derived from this Court's opinion in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) and were either identical to, or encompassed, the questions of constitutionality under the federal Constitution, so that the New York State courts must be found to have implicitly upheld the constitutionality of the zoning amendment under

the federal Constitution. App. 40a. In essence, the District Court denied petitioners' request for a preliminary injunction upon its belief that petitioners' federal constitutional claims were foreclosed by principles of collateral estoppel.

D. Proceedings in the Circuit Court

On March 11, 1998, the Hickerson and Amsterdam Video petitioners sought an interim stay pending a hearing before a three-judge panel on their motion for a stay pending appeal and expedited appeal. Circuit Judge John J. Walker granted the interim stay and set the motion down for hearing on March 17, 1998 before a three-judge panel of the Second Circuit.

Argument on petitioners' motions was held on March 17, 1998 before Circuit Judges Dennis Jacobs, Pierre N. Laval and John R. Gibson, sitting by designation. Petitioners' motion for a stay pending appeal was granted, as was the motion for an expedited appeal.

At issue in petitioners' appeal was whether, in denying petitioners' request for preliminary injunctive relief, the District Court erroneously concluded that petitioners' federal constitutional claims are foreclosed by principles of collateral estoppel. In addressing this issue, petitioners argued to the panel that, under Montana v. United States, 440 U.S. 147, 155 (1979), collateral estoppel is not appropriate (1) where the factual issues decided in the first proceeding are not substantively the same as those that need to be decided to resolve the claims in the second proceeding; or (2) where controlling facts have changed significantly between the first proceeding and the second; or (3) where other "special circumstances" warrant an exception from the normal rules of preclusion; or (4) where the party against whom collateral estoppel is being applied did not have a full and fair opportunity to litigate the issues.

Petitioners further argued to the panel that each of the four exceptions to collateral estoppel identified by the Supreme Court in Montana is present here. First, under both the state and federal constitutions, a municipality that seeks to restrict significantly the location of adult bookstores and theaters bears the burden of demonstrating that its enactment leaves reasonable alternative locations of existing businesses. But, the federal and state constitutions differ with respect to the sufficiency of the evidentiary submission necessary to discharge that burden. In the state court proceedings, City officials allowed that their calculation of potential areas for relocation rested upon an abstract and theoretical methodology that did not involve the identification of any specific parcels of land. Accordingly, the City could not determine whether any of its projected sites provided realistic opportunities for the relocation of adult businesses within a genuine real estate market (J.A. 874). It was and remains petitioners' position that the standards set forth by this Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), and refined by the lower federal courts -- particularly those of the Fifth and Ninth Circuits[13/] -- require a more rigorous examination of alternative locations than that offered by the City and employed by the state courts in upholding the City's enactment under the state constitution; and that, therefore, the fact-finding of the state courts on this issue was insufficient to satisfy federal constitutional standards.

Petitioners also asserted that new factual representations by the City had emerged between the conclusion of the state court proceedings and the subsequent proceedings before the District

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[13/] See, e.g., Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), cert. denied 511 U.S. 1030 (1994); Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995)("Woodall III"), infra at 20 et seq.

Court rendering collateral estoppel inappropriate. The new facts took the form of a statement by Mayor Rudolph Giuliani that the "number of adult establishments in the City would be reduced to no more than 20 or 30, whereas previously there had been over 200 [such businesses]." (J.A. 913-14). This projection, which was dramatically at odds with the 500 site projection offered by the City during the state court proceedings, raised serious questions about the City's claim of ample alternative locations for the nearly 150 businesses that will need to relocate under the zoning enactment.

Petitioners also argued, to the panel, that this case presents "special circumstances" that warrant an exception from the normal rules of preclusion. Such "special circumstances" arise out of the atypical posture of this case involving abstention under Railroad Commission v. Pullman Company, 312 U.S. 496 (1941); a remand of the state law issue to the state courts; the retention of the federal constitutional question for subsequent resolution; and the reinforcement of this procedural arrangement by petitioners' filing, pursuant to England v. Louisiana Board of Examiners, 375 U.S. 411 (1964), of an express reservation of the federal claims for resolution in the federal forum.[14/]

Finally, petitioners asserted that because of the severely

[14/] Petitioners further asserted that a second "special circumstance" was presented in this case by virtue of the unique doctrine created by this Court in Bose Corp. v. Consumers' Union, 466 U.S. 485 (1984) for First Amendment cases. Petitioners contended that, if petitioners were foreclosed from presenting new evidence in the federal court in support of their federal constitutional claim and if the factual record were imported from the state courts and given preclusive effect by the federal District Court, under Bose, that record must be subjected to de novo review by the federal Court of Appeals in order to make sure that the judgment does not constitute a "forbidden intrusion on the field of free expression."

constricted discovery and summary adjudication in the State Supreme Court, the state court proceedings did not provide a full and fair opportunity to litigate such questions as whether the City's enactment provided reasonable alternative locations for adult businesses.

In a decision, rendered on June 3, 1998, the United States Court of Appeals for the Second Circuit rejected each of these arguments and unanimously affirmed the District Court's decision. App. 4a. Petitioners filed a petition for rehearing and suggestion for rehearing en banc on June 17, 1998. On July 9, 1998, the Second Circuit denied petitioners' timely petition for rehearing. App. 1a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals first reasoned that the City's burden of demonstrating ample alternative locations is no greater under the First Amendment than that imposed by the New York State courts in applying state constitutional doctrine. In this regard, the Second Circuit concluded "we are aware of no federal case and petitioners have directed our attention to none that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas ...." App. 18a-19a. This determination conflicts with the decisions of the Fifth and Ninth Circuit Courts of Appeals on the same matter. Federal court decisions in the Fifth and Ninth Circuits impose a clear obligation on municipalities to demonstrate a sufficient number of parcels that are physically and legally available for the relocation of adult businesses. Such a demonstration cannot realistically be accomplished without the examination of the characteristics of specific sites.

In rejecting petitioners' claim that new facts have come to light warranting a re-examination of the question of whether

the City has provided ample alternative locations for adult businesses, the Second Circuit concluded that the new facts -- in the form of Mayor Giuliani's projection of no more than thirty remaining adult businesses -- are not sufficiently significant, for purposes of the Montana collateral estoppel analysis, "when compared to the extensive legislative record," App. 30a, that conflicts with the Mayor's projections vis-a-vis alternative locations. It follows, however, that if the City's state court submission on this issue was inadequate to satisfy First Amendment standards, the record adduced in the state courts on this issue cannot be found to outweigh, in significance, the recent statement by Mayor Giuliani that the municipal enactment would leave between twenty and thirty adult businesses in the City.

In England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 n. 13 (1964), this Court indicated that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question." Yet, the Second Circuit concluded that the principles set forth in England apply only to litigants who have invoked the jurisdiction of the federal court in the first instance; and that such principles do not bar the application of collateral estoppel in this case because petitioners initially filed their suit in state court and, therefore, the invocation of collateral estoppel does not deprive petitioners of their chosen federal forum. App. 24a-26a. But, in this regard, the Second Circuit focused only upon petitioners' initial decision to initiate their lawsuit in state court, rather than upon the choice made by the petitioners after the District Court's abstention decision in this case.[15/]

[15/] The Second Circuit also erroneously determined that the Bose doctrine is inapplicable.

Finally, on the issue of whether petitioners were denied a full and fair opportunity to litigate their claims in state court, the Second Circuit adopted the District Court's finding that the state court finding rested upon an extensive record. App. 23a. But, again, the proceedings in the state court were directed at a diminished and deferential state constitutional standard. Consequently, such evidence cannot be regarded as adequate to resolve petitioners' federal constitutional claim regardless of the size of the state court record on this issue. Moreover, the proceedings in the state court were quite abbreviated and suffered from limited discovery and no evidentiary hearings on the critical factual dispute with respect to whether the City had met its burden of ensuring that the zoning enactment provides a sufficient number of parcels that are physically and legally available for the relocation of adult businesses.

I. The Standards Applied by the Second Circuit for Determining Whether a Zoning Enactment "Allows for Reasonable Alternative Avenues of Communications" Are At Odds with the Standards Imposed by the Ninth and Fifth Circuits

Under First Amendment doctrine set forth by this Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), a municipality seeking to regulate adult book stores, theaters and places of entertainment must demonstrate, inter alia, that the enactment "allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 50. But, the issue of "reasonable alternatives" for the location of adult businesses invites the further question of what characteristics render a

parcel of land suitable or accessible for these purposes.[16/]

This question was addressed only fleetingly in Renton. And this is not entirely surprising, since Renton did not involve the problem of finding re-location sites for "adult" businesses that were forced to move as a result of the ordinance at issue in that case. For, in Renton, no adult businesses were present in the community at the time that the municipality enacted its zoning legislation. Renton, 475 U.S. at 44. But, in Renton, this Court indicated that a municipality must "refrain from effectively denying [adult businesses] a reasonable opportunity to open and operate [...] within the city." Id.

Accordingly, the task of refining the concept of the suitability of alternative locations has been left largely to the lower federal courts. In discharging this task, the federal courts have generally required municipalities to demonstrate that alternative locations are suitable for and accessible to

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[16/] Under the First Amendment, the general standard of "reasonable alternative" locations embraces two subsidiary questions. As is more fully discussed in the text, infra, the first question involves the genuine accessibility and realistic suitability of such alterative sites.

The second question is whether the zoning enactment under review will reduce the number of adult businesses below a constitutionally acceptable threshold. In this regard, the lower federal courts have looked to this Court's decisions in Young v. American Mini Theatres, 427 U.S. 50 (1976), and Schad v. Borough of Mt. Ephraim, 452 U.S. 62, 71 (1981), and concluded that, under the First Amendment, it is constitutionally impermissible for a zoning enactment to, in fact, reduce the total number of such businesses. See Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1108-09 (9th Cir. 1988); Christy v. Ann Arbor, 84 F.2d 489 (6th Cir. 1987). This question acquires special importance in a case, such as this, where a zoning enactment will require a great many adult businesses to close or to relocate.

adult businesses as a realistic and practical matter. Therefore, petitioners argued to the Second Circuit that -- in order to sustain its burden under the First Amendment -- the City must demonstrate that there are a sufficient number of specific sites that are physically and legally available and part of the actual business real estate market to satisfy, at the least, the nearly 150 adult businesses that will be forced to relocate. The Second Circuit found, however, that the argument that the City must "identify the precise sites to which adult establishments could relocate" is "unsupported by any federal case law." App. 18a-19a. This conclusion is incorrect.

In Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), cert. denied 511 U.S. 1030 (1994), the Ninth Circuit indicated that there were two overarching questions that a court must answer when determining whether an adult establishment has been afforded a reasonable opportunity to relocate.[17/] The court must first consider "whether relocation sites provided to businesses may be considered part of an actual business real estate market." Id. at 1530 (emphasis supplied). According to the Ninth Circuit, the Court must then consider whether "after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses." Id.

The Ninth Circuit further identified five specific questions with respect to each proposed relocation site -- (i) is the site ever likely to become available to any commercial enterprise; (ii) is the site reasonably accessible to the general public; (iii) does the site have a proper infra-structure such as sidewalks,

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[17/] The Ninth Circuit noted that "although Renton stresses that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility." Topanga, 989 F.2d at 1531.

roads and lighting; (iv) does the site suit some generic commercial enterprise or is it a warehouse, swamp or sewage treatment plant; and (v) is the site commercially zoned. The five-part Topanga inquiry logically assumes that relocation sites be specifically identified. These questions cannot be answered in the abstract.

Indeed, the Ninth Circuit indicated that both the Topanga plaintiffs and the City of Los Angeles introduced substantially similar yet detailed analyses of specific relocation sites that fell within the reach of the zoning ordinance under consideration in Topanga. See Topanga, 989 F.2d at 1531-1533. The Topanga court accepted the findings of the Topanga plaintiffs' geographical expert and real estate expert who

> conducted an extensive survey of the City to determine which geographical areas within the City would be permissible as potential sites for establishing or relocating these adult businesses [finding] that there are 11613.1 acres of what the parties call "definitionally available" relocation sites where the City would allow an adult business to exist. Out of these 11613.1 acres, however, [the experts] concluded that much of the land was not truly available ... [including, among other things, thousands of potentially available acres submerged beneath the Pacific Ocean or the outer harbor of the Port of Los Angeles, or occupied by landing strips for the Los Angeles Airport, landfill, the Van Nuys airport, Port of Los Angeles and oil refineries, petroleum gas storage fields, large industrial plants, Children's Hospital, junk yards, steel yards, car storage lots].

Id. at 1531-32.

The Ninth Circuit is not alone in fashioning standards to

determine whether a municipality restricting adult businesses has, in actual and realistic terms, allowed ample alternative locations. Other federal decisions have also insisted upon a realistic and factual demonstration. In Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995)("Woodall III"), the Fifth Circuit indicated that "in determining whether there are sufficient sites available, the finder of fact may exclude land under the sea, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking a proper infrastructure, and so on." In Woodall -- as in Topanga -- the municipality offered a specific identification of available sites. "The City identified 50 specific sites meeting the Ordinances' spacing requirements which it contended were physically and legally available [...] In addition to the 50 sites identified as available in 1988, the City identified 16 additional sites that had become available due to rezoning." Woodall, 49 F.3d at 1125. See also Woodall v. The City of El Paso, 950 F.2d 255, 260-1 (5th Cir. 1992)("Woodall I"), modified on reh'g, 959 F.2d 1305 (5th Cir. 1992)("Woodall II")(same).

In a number of other federal court decisions, sites were specifically identified and analyzed under the reasoning set forth in Topanga and Woodall. For example, in Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068, 1069 (5th Cir. 1994), the District Court was able to identify 63 specific sites and that court, as well as the Fifth Circuit, was provided with substantial testimony as to the specific sites in order to determine whether sites had electricity and gas available, water and sewer extensions, street access or current use by a government entity. In Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1108 (9th Cir. 1988), cert. denied, 490 U.S. 1006 (1989), the Ninth Circuit invalidated a zoning ordinance because separational requirements eliminated most of the allegedly available acreage from the analysis, but

specifically noted that it also had insufficient information about the specific nature of the sites to determine whether the zoning ordinance at issue in that case violated Renton. In Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255 (5th Cir. 1992), the court noted that there were "four areas with eight to ten locations" available and suitable as alternative sites for the six establishments in the city and that "nothing in the instant record indicate[d] that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure or that legal obstacles exist to their use." Lakeland Lounge, 973 F.2d at 1260. See also Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982)(specific site by site analysis conducted by the court which revealed that the industrial zones were largely a patchwork of swamps, warehouses and railroad tracks, lacking access roads and retail establishments, locations that were "poorly lit, barren of structures suitable for showing films and perhaps unsafe"); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1214-15, 1223-25 (N.D. Ga 1981)(same, containing a comprehensive analysis of unavailability of specific sites, including easements, location in flood plains, inaccessible to automobile traffic, location in or near noxious uses including petroleum fuel tank fields and sewage treatment plants, employee parking lots for large permanent manufacturing facilities, land owned by the City of Atlanta and railroad rights of way).[18/]

[18/] In D.H.L. Associates, Inc. v. O'Gorman, 6 F. Supp.2d 70 (D. Mass. 1988), the Court applied the Topanga test in considering whether five specific parcels were "available." In Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288 (M.D. Fla. 1997), the court accepted both the Topanga and the Woodall tests in its analysis of whether twenty specific sites considered "available" by the City were, in fact, available. The district court ultimately concluded that nineteen sites were available, but that that number was constitutionally inadequate. In Centennial Video, Ltd. v. City of Rock Island, 1992 U.S. Dist. LEXIS 4882 (C.D. Ill. 1992), the court accepted the Woodall test but denied both parties' motions for

(continued...)

In this case, New York City offered and the state courts accepted a highly abstract calculation of alternative locations. The City officials simply claimed that it was theoretically possible to fit 500 adult businesses within a general area set aside for such businesses, if one did not consider whether any of the theoretical locations were realistically available as part of a viable real estate market; and that, it was not possible to know whether any locations were genuinely available because City officials had not identified actual sites.

Such a showing by the City cannot be found sufficient under the First Amendment. The Second Circuit's acceptance of the approach adopted by the New York Courts in this case has diminished First Amendment standards well below any level of serious judicial scrutiny and has placed the Second Circuit dramatically at odds with the interpretation of First Amendment doctrine provided by the other circuits discussed above. This Court should grant certiorari to resolve that direct conflict and to make it clear that the First Amendment requires more serious judicial scrutiny than was applied by the Second Circuit.

II. The Courts Below Disregarded this Court's Teaching in *Montana v. United States*, 440 U.S. 147 (1979), When They Invoked Principles of Collateral Estoppel to Deny Petitioners' Request for Preliminary Injunctive Relief.

In Montana v. United States, 440 U.S. 147, 155 (1979), this Court indicated that collateral estoppel is not appropriate (1) where the factual issues decided in the first proceeding are not substantively the same as those that need to be decided to

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[18]/(...continued)
summary judgment on the grounds that it had "insufficient information regarding the nature of the 102 acres at issue" to apply the Woodall test.

resolve the claims in the second proceeding or (2) where controlling facts have changed significantly between the first proceeding and the second; or (3) where other "special circumstances" warrant an exception from the normal rules of preclusion; or (4) where the party against whom collateral estoppel is being applied did not have a full and fair opportunity to litigate the issues. Each of the four exceptions to collateral estoppel identified in Montana is present here.

A. The Recent Statement of Mayor Giuliani Raises New Factual Issues that Are Significant and Sufficiently Serious To Raise a Fair Ground for Litigation

It follows that if the City's evidentiary submission in the state courts was insufficient to satisfy First Amendment standards on the issue of reasonable alternative locations, the record adduced in the state courts on this issue cannot be found sufficient to outweigh, in significance, the recent suggestion by Mayor Giuliani that the City's enactment would leave between twenty and thirty adult businesses in the City. (J.A. 913-14). At the very least, Mayor Giuliani's statement creates "sufficiently serious questions going to the merits" to create a "fair ground for litigation."[19/]

[19/] As this Court established in Young, 427 U.S. at 71 n. 35, 78-79, zoning laws that significantly reduce the number of adult theaters, bookstores and other places of entertainment below the quantity that existed prior to the enactment cannot be found to satisfy the First Amendment requirement that the City provide "reasonable" alternative locations for such businesses.

B. The Second Circuit Mistakenly Concluded that an England Reservation May Only be Made by a Party that has Invoked the Jurisdiction of the Federal Court in the First Instance

In England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 n. 13 (1964), this Court indicated that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question." Yet, the Second Circuit concluded that the principles set forth in England apply only to litigants who have invoked the jurisdiction of the federal court in the first instance and that petitioners cannot "meaningfully be said to have been deprived of a federal forum for their federal claims," since they initiated their lawsuit in state court. App. 24a-26a.

The Second Circuit's reasoning overlooks the fact that regardless of the initial litigation choice made by petitioners, the legally significant choice made by the petitioners, for purposes of the England analysis, occurred after the District Court issued its June 1996 abstention order. At that point, petitioners had the choice of presenting federal and state constitutional claims to the state courts or filing an England reservation re-enforcing the retention of federal jurisdiction over the federal constitutional claims by the federal District Court. They chose to file an England reservation in the state Supreme Court. And they adhered to the commitment made in their England reservation by presenting no federal constitutional claims in the state court proceedings. Under these circumstances, they should not have been denied their right to the adjudication of the factual as well as legal components of their federal constitutional claims by the federal courts, free from the preclusive reach of the collateral estoppel doctrine.

C. Petitioners Were Not Afforded a Full and Fair Opportunity to Litigate the Issue of Reasonable Alternative Avenues of Communication

The City's failure to demonstrate specific sites for the relocation of adult businesses is unsurprising in light of the abbreviated proceedings that took place in the state trial court -- proceedings that included virtually no discovery and no evidentiary hearing at which the City's claim of ample alternative locations could be measured against the rigors of cross-examination and evidentiary objections. (J.A. 826-27, 845-47).

This action was commenced in state court in February 1996. One month later, the City served a Notice of Petition for removal of the litigation from New York State Supreme Court to the federal District Court. Petitioners then sought to have the matters remanded to New York State Supreme Court. The matters were remanded to State Supreme Court by the District Court on June 27, 1998. Petitioners then served discovery requests on defendants which defendants largely refused to answer. Such discovery requests were directed, inter alia, at the numbers, locations and types of available relocation sites. As is set forth more fully in the record (J.A. 827), the State Supreme Court not only repeatedly denied petitioners' request that defendants be compelled to comply with such outstanding discovery requests, but entered an order, prior to any motions for summary judgment having been made, prohibiting any party from engaging in discovery without a court order.

The City, and the intervenors-defendants, then each moved for summary judgment, whereupon the State Supreme Court refused to entertain petitioners' request for further discovery -- except that the State Supreme Court grudgingly ordered one limited deposition to be taken of a witness who purported to

be familiar with the City's calculation of alternative locations. Defendants fiercely opposed even this limited discovery and the details as to what transpired at that deposition -- which included at least 30 directions to the witness not to answer questions that were propounded and repeated denials of requests for the production of documents that were critical to the City's hypothetical calculation that 500 sites exist for the 147 adult establishments that would be required to relocate -- are set forth more fully in the record. (J.A. 8450-47).

On October 23, 1996, the State Supreme Court granted the City's and intervenors-defendants' motions for summary judgment, upholding the constitutionality of the adult zoning enactment and dismissing petitioners' state constitutional claims. The State Supreme Court rested its decision on the papers submitted and oral argument held on September 18, 1996. The State Supreme Court held no evidentiary hearing, refused to take any witness testimony, and permitted no cross-examination of the witnesses whose affidavits had been proffered by the City. Under such circumstances, the conclusion that petitioners were not afforded a full and fair opportunity to litigate the issue of reasonable alternative avenues of communication appears inescapable.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant certiorari review.

Respectfully submitted,

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October 5, 1998

unreported

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, and ELLIOT STAMLER, Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK, HON. RUDOLPH W. GIULIANI, as Mayor of the City of New York, JOSEPH B. ROSE, as Director of City Planning, Department of City Planning of the City of New York, and GASTON SILVA, as Commissioner of Buildings, Department of Buildings of the City of New York, Defendants-Appellees,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, BELLAIRE/BELL-VILL CIVIC ASSOCIATION, BNOS ISRAEL GIRLS' SCHOOL, BOWNE PARK CIVIC ASSOCIATION, BRIARWOOD COMMUNITY ASSOCIATION, BRONX COMMUNITY BOARD # 12, BROOKLYN CIVIL COUNCIL, BROOKLYN TENANTS COUNCIL, CARDINAL SPELLMAN HIGH SCHOOL, COALITION OF UNITED RESIDENTS FOR A SAFER ENVIRONMENT, COLLEGE POINT BOARD OF TRADE, COMMITTEE FOR A BETTER AND SAFER NOSTRAND AVENUE, COMMUNITIES OF MASBETH AND ELMHURST TOGETHER, COMMUNITY SCHOOL DISTRICT 21 PRESIDENTS' COUNCIL, CONGREGATION BNAI SHLOIMA ZALMAN, CROWN HEIGHTS TAXPAYERS AND CIVIC ASSOCIATION, DOUGLASTON CIVIC ASSOCIATION, EAST MIDWOOD NEIGHBORHOOD ASSOCIATION, COUNCILMEMBER ANDREW ERISTOFF, GRAND CENTRAL PARTNERSHIP, HOLLISWOOD CIVIC ASSOCIATION, HUDDE JUNIOR HIGH SCHOOL PARENTS ASSOCIATION, JACKSON

HEIGHTS COMMUNITY DEVELOPMENT CORPORATION, KINGS HIGHWAY DISTRICT MANAGEMENT ASSOCIATION, KINGSWAY JEWISH CENTER; LAWYERS' COMMITTEE ON VIOLENCE, MANHATTAN TERRACE CIVIC ASSOCIATION, COUNCILMEMBER HELEN MARSHALL, MIDWOOD CIVIC ACTION COUNCIL INC., NEW NORTHERN BOULEVARD BUSINESS ASSOCIATION, NORTHERN BOULEVARD MERCHANTS' ASSOCIATION, 100-299 EAST 77TH STREET BLOCK ASSOCIATION, PROSPECT PARK YESHIVA, QUEENS BRADDOCK CIVIC ASSOCIATION, QUEENS VILLAGE CIVIC ASSOCIATION, REAL ESTATE BOARD OF NEW YORK, RESIDENTS AGAINST STREET PROSTITUTION, ROSEDALE BLOCK ASSOCIATION, ROSEDALE CIVIC ASSOCIATION, COUNCILMEMBER JOHN SABINI, 34TH STREET PARTNERSHIP, UNITED CIVIC COUNCIL OF QUEENS, UNITED COMMUNITY CIVIC ASSOCIATION, COUNCILMEMBER ANTHONY WEINER, WEST 45TH STREET BLOCK ASSOCIATION, WEST 47TH/WEST 48TH STREET BLOCK ASSOCIATION and WEST 90'S/WEST 100'S NEIGHBORHOOD COALITION,
Defendants-Respondents-
Intervenors-Appellees.

Docket No. 98-7269

July 9, 1998

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant, Rachel Hickerson, Derek Jones, Ty McConnell and Elliot Stamler.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

146 F.3d 99[1/]

RACHEL HICKERSON, et al., Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK, et al., Defendants-Appellees,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Defendants-Respondents-Intervenors-Appellees.

***

AMSTERDAM VIDEO INC., A & X ENTERTAINMENT INC., d/b/a Playpen II, ADULT VIDEO, INC., ASCOT SPACE AMUSEMENT, INC., d/b/a Ascot Theatre, BIG APPLE CINEMAS INC., d/b/a Show Follies Theater, BRETT DISTRIBUTORS, INC., d/b/a Media Distributors, CAPRI CINEMA INC., CAPWELL ENTERTAINMENT, INC., d/b/a Legz Diamond's Playhouse, CHURCH STREET CAFE INC., d/b/a Baby Doll Lounge, COLLEGE PT. REST. CORP., d/b/a Gallagher's II, CRAZY FANTASY VIDEO, INC., CUPID'S TREASURES, INC., d/b/a Banana Video and Unicorn, DARA DISTRIBUTORS INC., d/b/a Love Shack, DESIRE VIDEO INC., E & A BOOKS, INC., E & A VIDEO AND MAGAZINE INC., ED-MART BAR & GRILL INC., d/b/a Penny Whistle, FOR THE PEOPLE THEATRES OF N.Y., INC., d/b/a Fair Theatre, FOUR KEYS ENTERPRISES, INC., d/b/a Hollywood Peepshows, FOURTEENTH ST.

[1/] The caption in this case is exactly the same as those of the federal court cases previously set forth in this appendix, with one exception: this caption includes the complete caption of the plaintiffs in the Amsterdam Video matter.

ENTERPRISES INC., d/b/a All Male Adult Video, FUN CITY VIDEO CORP., G & D MERCHANDISE CORP., d/b/a Peepland, GOTHAM EXHIBITOR INC., d/b/a Peep O Rama, HELEN WOLFF LTD., d/b/a Come Again, I.S. SULTARS INC., J & J TUMMY YUMMIES CORP., d/b/a Naked City, JGJ MERCHANDISE CORP., d/b/a Peepland/Valentina's II, JHM VIDEO CORP., JUM OPERATING CORP., d/b/a Peepland, JVR VIDEO CENTER INC., d/b/a Playground, KINEMATICS MERCHANDISING & DISTRIBUTORS, INC., d/b/a Kinematics, KISMA VIDEO, INC., L & T VIDEO, INC., d/b/a Badlands Adult Video, MADELINE D'ANTHONY ENT. INC., d/b/a Harmony Theatre, MANHATTAN VIDEO INC., MARQUIS VIDEO INC., d/b/a Marquis Video, MIRAGE PRODUCTIONS INC., d/b/a Love Shack, MONTANA HOLDINGS INC., d/b/a Runway 69, NAWAN ENTERTAINMENT INC., d/b/a Euro World, NILUPUL VIDEO INC., N.R.S. VIDEO INC., NY VIDEO INC., d/b/a Love Shack, PABON THEATRE CORP., d/b/a Eros Theatre, PEREGRINE ENTERPRISES, INC., d/b/a Paradise Club, R.E.J.M., INC., d/b/a Big Top, RON BOB PUB INC., d/b/a Gallagher's, SAMI'S VIDEO WAREHOUSE, d/b/a Warehouse on the Block, LTD, SERENDIB VIDEO INC., d/b/a Serendib Video, SPH VIDEO CORP., STAR DISTRIBUTORS, LTD, STATEWIDE VIDEO INC., STEAM HEAT INC., STS VIDEO INC., d/b/a Adult Video, SUEMAR VIDEO, INC., d/b/a Goodtime Video, THIRD AVENUE ENTERTAINMENT INC., d/b/a XXX Video, THUNDER VIDEO INC., TOWN VIDEO SALES, INC., d/b/a Les Hommes Book Shop, VIDEO, VIDEO, VIDEO, INC., VIDEO 30 OF QUEENS INC., d/b/a Ecsxxxtasy Video, WEST VIDEO INC., ZIDEO VIDEO INC., 21 ANN STREET CORP., d/b/a Ann Street Adult Entertainment, 130 C STREET CORP., d/b/a Christopher Street Book Shop, 155 VIDEO CENTER CORP., d/b/a Peepworld, 300 BOOK CENTER, 303 W.42ND STREET ENTERPRISES INC., d/b/a Show World, 323 CANAL ST.

INC., 325 W. 45TH ST. REST. CORP., d/b/a Private Eyes, 35-30 38th St. Corp., d/b/a Cityscape, 412 8TH AVE. CORP., d/b/a Nude New York City, 45-08 VERNON BLVD. CORP., d/b/a Riverhead Inn, 603 VIDEO INC., 610 VIDEO STORE INC., 691 8TH AVENUE CORP., 691 VIDEO CENTER CORP., 693 VIDEO CORP., d/b/a TNL Video, 711 ASSOCIATES LTD., d/b/a Peepland, 729 6TH AVENUE CORP., d/b/a Billy's Topless, 733A CORP., d/b/a Video Palace, 763 VIDEO STORE INC., 777-779 8TH AVE. CORP., d/b/a Hollywood Twin, 81-22 BAXTER AVE. LOUNGE INC., d/b/a ILDA'S PLACE II, Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK, et al., Defendants-Appellees,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Defendants-Respondents-Intervenors-Appellees.

Nos. 98-7269, 98-7270

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

June 3, 1998

HERALD PRICE FAHRINGER, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, New York, NY (Erica T. Dubno, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP; J. Michael Murray, Berkman, Gordon, Murray & DeVan, of counsel), for Plaintiffs-Appellants Amsterdam Video, Inc., et al.

BETH HAROULES, New York Civil Liberties Union Foundation, New York, NY (Arthur N. Eisenberg, Norman Siegel, New York Civil Liberties Union Foundation, of counsel), for Plaintiffs-Appellants Rachel Hickerson, et al.

LEONARD J. KOERNER, Office of the Corporation Counsel of the City of New York, New York, NY (Michael D. Hess, Corporation Counsel of the City of New York, Gabriel Taussig, Elizabeth S. Natrella, of counsel), for Defendants-Appellees.

FREDERICK A.O. SCHWARZ, JR., Cravath, Swaine & Moore, New York, NY, for Defendant-Respondent-Intervenor-Appellee Times Square Business Improvement District.

WAYNE A. CROSS, Dewey Ballantine LLP, New York, NY, for Defendants-Respondents-Intervenors-Appellees Center for the Community Interest, et al.

Before: VAN GRAAFEILAND, MESKILL, and CABRANES, Circuit Judges.

JOS A. CABRANES, Circuit Judge:

This case concerns an amendment to the Zoning Resolution of the City of New York (the "Zoning Amendment") regulating the zoning of "adult establishments," as defined by the Zoning Amendment. The principal provisions of the Zoning Amendment limit the permissible locations of adult

establishments to non-residential districts[2/] and require that they be located--within the districts in which they are permitted--at least 500 feet away from any school, day care center, or house of worship; at least 500 feet from excluded districts; and at least 500 feet from one another. Plaintiffs in these consolidated cases are patrons and owners of adult establishments within New York City who claim that the Zoning Amendment violates their rights to free expression under Article I, § 8 of the New York State Constitution and the First Amendment of the United States Constitution. In a case involving a different set of plaintiffs, we recently upheld the Zoning Amendment against facial federal constitutional challenges under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. See Buzzetti v. City of New York, 140 F.3d 134, 1998 WL 130866 (2d Cir. 1998).

The factual background of the Zoning Amendment is detailed both in Buzzetti and in prior state and federal decisions arising from the instant litigation, with which we assume familiarity. See Hickerson v. City of New York, 997 F. Supp. 418, 1998 U.S. Dist. LEXIS 2635, 1998 WL 105583 (S.D.N.Y. 1998); Hickerson v. City of New York, 932 F. Supp. 550 (S.D.N.Y. 1996); Stringfellow's of New York, Ltd. v. City of New York, 171 Misc. 2d 376, 653 N.Y.S.2d 801 (N.Y. Sup. Ct. 1996), aff'd, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), aff'd, 91 N.Y.2d 382, 1998 N.Y. LEXIS 137, 1998 WL 77749, 671 N.Y.S.2d 406, 694 N.E.2d 407 (N.Y. 1998). The instant appeal is from an order of the United States District Court for the Southern District of New York

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[2/] Even prior to the passage of the Zoning Amendment, New York City's Zoning Resolution prohibited new commercial development in residentially zoned districts. Under the Zoning Amendment, adult establishments are also barred from certain districts that are zoned for commercial and manufacturing uses, but that permit new residential development as well.

(Miriam Goldman Cedarbaum, Judge), dated March 6, 1998, which denied plaintiffs' motion for a temporary restraining order and a preliminary injunction to stay the enforcement of the Zoning Amendment.[3/] Although at the heart of this litigation is a controversy over free expression, plaintiffs have already presented their free-speech claims to the New York courts. The only question before us is whether the New York courts' rejection of plaintiffs' state constitutional claims forecloses plaintiffs from relitigating, in the form of a First Amendment claim in federal court, the same issues that were resolved against them in state court. We agree with the district court that the "full faith and credit" statute prevents a federal court from revisiting the same issues that were decided against plaintiffs by the New York state courts, which provided plaintiffs with a full and fair opportunity to litigate these issues. Accordingly, we affirm.

I.

We review the district court's denial of a preliminary injunction for an abuse of discretion. See Bery v. City of New York, 97 F.3d 689, 693 (2d Cir. 1996). "It is by this time black-letter law that the party seeking a preliminary injunction must establish that: (1) absent injunctive relief, it will suffer an irreparable injury; and (2) either (a) a likelihood of success

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[3/] During the prior state-court proceedings, the enforcement of the Zoning Amendment was stayed by court order. The stay was terminated by Judge Cedarbaum's March 6, 1998 order denying plaintiffs' application for a preliminary injunction. Judge Cedarbaum stayed her order until March 11, 1998, to allow plaintiffs to seek a stay in this Court. Judge Walker extended the stay to March 11, 1998 so that the issue could be considered by a three-judge panel, and the panel ordered the appeal to be expedited and extended the stay through the hearing of the expedited appeal. At oral argument of this expedited appeal on April 29, 1998, we extended the stay until further order of this Court.

on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant." Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A., 143 F.3d 689, 1998 U.S. App. LEXIS 8830, 1998 WL 220954, at *9 (2d Cir. 1998). "Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." Bery, 97 F.3d at 693. Because we conclude, however, that plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim, they can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation."

Under the full faith and credit statute, 28 U.S.C. § 1738,[4/] "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." Allen v. McCurry, 449 U.S. 90, 96, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980); see also Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984) (noting that § 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims"); see generally Montana v. United States, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979) ("A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . .

[4/] 28 U.S.C. § 1738 provides, in pertinent part, that state court determinations "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

.") (quoting Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49, 42 L. Ed. 355, 18 S. Ct. 18 (1897) (ellipses in original)). New York law provides that an issue may not be relitigated if the identical issue was necessarily decided in a previous proceeding, provided that the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior action. See, e.g., In re Sokol, 113 F.3d 303, 306 (2d Cir. 1997); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 826-27, 467 N.E.2d 487, 490-91 (1984).

We agree with the district court that the issues decided and the standards applied by the New York state courts in rejecting plaintiffs' state constitutional challenge are the same that would be applicable to plaintiffs' First Amendment claim. Under both the federal and state Constitutions, the Zoning Amendment must: (1) be "content neutral," in the sense that it is aimed not at the restricted speech itself but at the negative secondary consequences that flow from it; (2) serve substantial government interests and be no broader than necessary to serve these interests; and (3) leave open reasonable alternative avenues of communication. Compare City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49-50, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), with Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406, 1998 N.Y. LEXIS 137, 1998 WL 77749, at *5 (N.Y. 1998). The New York Court of Appeals unanimously held that the Zoning Amendment met these standards--just as this Court in Buzzetti found the Zoning Amendment constitutionally unobjectionable on the record then before us--and this determination is equally dispositive of plaintiffs' claim under the First Amendment. Cf. Kremer v. Chemical Construction Corp., 456 U.S. 461, 479-80, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982) (holding, in Title VII case, that "although the claims presented to the NYHRD [New York State Division of Human Rights] and subsequently reviewed

by the Appellate Division were necessarily based on New York law, the alleged discriminatory acts are prohibited by both federal and state laws. The elements of a successful employment discrimination claim are virtually identical; petitioner could not succeed on a Title VII claim consistently with the judgment of the NYHRD that there is no reason to believe he was terminated or not rehired because of age or religion. The Appellate Division's affirmance of the NYHRD's dismissal necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless." (footnotes omitted)).

Plaintiffs do not deny that the state and federal standards are nominally the same in all material respects, but rather argue that the standards are applied differently in state and federal court. In particular, plaintiffs contend that federal courts require greater proof from municipalities that the non-speech-related government interests at stake are substantial and that reasonable alternative avenues of communication remain available. We note that this contention is in stark contrast to plaintiffs' repeated assertions in earlier stages of this litigation that New York courts apply more favorable standards to their free-speech claims than federal courts. In any event, apart from their recent vintage, plaintiffs' arguments are mistaken.

A. Substantial Government Interests

With respect to the substantiality of New York's non-speech-related interests in the Zoning Amendment, the New York Court of Appeals observed that "the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City." Stringfellow's, 91 N.Y.2d

at 397, 1998 N.Y. LEXIS 137, 1998 WL 77749, at *6. The court then reviewed in detail this legislative record, which included studies by the Times Square Business Improvement District, the Chelsea Action Coalition and Manhattan Community Board 4, and the Department of City Planning ("DCP"). Each of these studies linked the presence of adult establishments to increased crime and decreased property values. See id. at *6-7.[2] The court also noted that, apart from the City's own studies, the legislative record contained the conclusions of studies conducted by city councils and town boards throughout the country, which also showed a correlation between adult establishments and negative secondary effects such as increased crime, depressed real estate markets, and an overall decline in the quality and character of surrounding neighborhoods. See id. Finally, the court rejected plaintiffs' complaints about the sufficiency of the evidence, holding that it was entirely appropriate to rely on studies from other jurisdictions--particularly in light of the fact that City officials had considered the comparability and reliability of these studies--and that the "non-empirical" nature of some of the City's evidence (i.e., from surveys of businesses and real-estate brokers) did not render it valueless or insubstantial. See id. at *8.

Plaintiffs now raise the same objections to the City's

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[2] Although plaintiffs argue on appeal that the DCP's own study suggests no correlation between adult establishments and the negative secondary effects identified by the City, the New York Court of Appeals took account of, and rejected, this very argument, observing that "although the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area." Id. at *7.

evidence that were rejected by the New York Court of Appeals, and despite that court's thorough review and analysis of the legislative record, plaintiffs claim that federal law requires the City to provide greater evidence of negative secondary effects than the New York courts required. Accordingly, plaintiffs contend that they are not estopped from relitigating the sufficiency of the City's evidence under this allegedly more stringent federal standard. In arguing that a more stringent standard exists, plaintiffs rely almost exclusively on Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) (en banc), a case that provides no support whatsoever for their position. Phillips was an adult-use zoning case in which the Third Circuit required additional evidentiary support for a zoning ordinance that had been upheld by the district court "(1) without an answer from the defendants identifying the secondary effects alleged to justify the burden on expression, and (2) without a record supporting the reasonableness of any legislative expectations regarding the likelihood of these secondary effects and the ameliorative effect of the ordinance." Id. at 173. The Third Circuit noted that, whereas in Renton the Supreme Court had considered the City of Renton's legislative record to be adequate where it consisted solely of studies from other cities that could reasonably be deemed relevant, "here, the district court had no way of knowing what problem or problems the Borough thought it was facing and there is no study or other evidence in the record concerning the secondary effects of 'adult entertainment uses.'" Id. at 174. In order to avoid "reducing the First Amendment to a charade in this area," id. at 175, the Third Circuit required the Borough at least to "identify" the secondary effects with some particularity, and to "offer some record support for the existence of those effects," id. Far from suggesting that federal law would require more exacting scrutiny of the legislative record than was undertaken by the New York courts in this case, Phillips stands for nothing more than the unremarkable proposition that a barren legislative

record will not suffice under the First Amendment--a proposition which is unhelpful to plaintiffs, in light of the fact that the legislative record in the present case is quite extensive, as the state courts recognized.

In any event, quite apart from the fact that we find no merit in plaintiffs' argument that the federal standard for judging the substantiality of New York's non-speech-related interests is stricter than the state standard, this Court, in Buzzetti, has already considered and rejected the argument that the legislative record is inadequate, as a matter of federal law, to support the City's legitimate and substantial interests in the Zoning Amendment. As we stated in Buzzetti:

Renton emphasized that city officials were not required to make particular findings regarding the secondary effects of adult entertainment in Renton itself, but rather were "entitled to rely on the experiences of . . . other cities." Renton, 475 U.S. at 51, 106 S. Ct. at 931; see id. at 51-52, 106 S. Ct. at 931 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."). Thus, New York City's reliance on studies from a variety of other areas of the country was well-placed. But . . . New York City went beyond this minimal requirement: the DCP conducted its own detailed study, consulted other studies conducted in particular neighborhoods of New York City, and considered testimony given at public hearings in New York.

140 F.3d at 140, 1998 WL 130866, at *7 (first ellipsis in original). Accordingly, it is clear that there is no basis for allowing plaintiffs to relitigate this issue in federal court.

B. Alternative Avenues of Communication

Plaintiffs' argument that federal courts apply a more stringent standard than the New York courts applied to determine whether there are "reasonable alternative avenues of communication" is also unavailing. Indeed, the New York Court of Appeals summarized the standard that federal courts have applied, and proceeded to apply that very standard as the basis for its inquiry under the state Constitution. The court's discussion merits quotation at length:

Relying on a formula derived from City of Renton v. Playtime Theatres . . ., the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (id., at 53-54). Under Renton, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (see, City of Renton v. Playtime Theatres, [475 U.S.] at 53; Woodall v. City of El Paso, 49 F.3d 1120, 1124-25 [(5th Cir.)], cert. denied, 516 U.S. 988, 116 S. Ct. 516, 133 L. Ed. 2d 425 [(1995)]; Grand Brittain, Inc. v. City of Amarillo, Tex., 27 F.3d 1068, 1070 [(5th Cir. 1994)]; see also, Town of Islip v. Caviglia, [73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215,] 555, 560 [(1989)] (areas of a municipality set aside for adult uses need not be prime locations)). Rather, the inquiry is limited to the physical and legal availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (see, Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1530-31 [(9th Cir. 1993)], cert. denied, 511 U.S. 1030,

128 L. Ed. 2d 190, 114 S. Ct. 1537 [(1994)]; see also, Woodall v. City of El Paso, supra; Alexander v. City of Minneapolis, 928 F.2d 278 [(8th Cir. 1991)].

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (see [Topanga], 989 F.2d at 1531). Notably, these considerations dovetail nicely with Islip's requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d at 555, 560). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Stringfellow's, 91 N.Y.2d at 402, 1998 N.Y. LEXIS 137, 1998 WL 77749, at *9-10.

Significantly, the two cases most heavily relied upon by plaintiffs in arguing that federal law imposes more of an evidentiary burden on the City to prove the availability and suitability of alternative sites than the New York state courts imposed--Topanga Press, Inc. v. City of Los Angeles and Woodall v. City of El Paso--were cited and relied upon by the New York Court of Appeals. Forced to acknowledge this fact, which strongly suggests that the state court was not answering a different question or applying a standard less favorable to plaintiffs than federal courts would apply, plaintiffs argue that while "the New York Court of Appeals did refer to the Topanga and Woodall decisions[, a]nd . . . did suggest that the City was obligated to demonstrate 'the physical and legal availability of alternative sites . . . . and whether those sites

are part of the actual business real estate market[,]' . . . there is a serious analytic gap between this language . . . and the factual record developed in the state trial court." Brief of Hickerson Appellants at 31-32. Plaintiffs argue, in other words, that while the New York Court of Appeals purported to be making the same determination that a federal court would make under federal law to determine the availability of "reasonable alternative avenues of communication," plaintiffs should not be collaterally estopped from relitigating this issue because the "serious analytic gap" between the evidence and the recited standard belies any conclusion that federal standards were genuinely applied.

We find no such "serious analytic gap," nor any reason to doubt that the New York Court of Appeals answered the same question that would be dispositive under federal law. Plaintiffs' primary argument to the contrary is that federal law requires municipalities to identify the specific physically and legally available relocation sites. Plaintiffs have produced an affidavit from a land-use planning consultant, Robert McLaughlin (the "McLaughlin Affidavit" or "Affidavit"), which asserts that some of the land identified by the City as available for relocating adult establishments is not realistically available, for a variety of reasons--some of the land, for example, is allegedly occupied by "oil tank farms" and structures including "numerous and large facilities of the New York City Sanitation Department." McLaughlin Affidavit at 24, 26. Unless the City can precisely identify the "physically and legally available" sites to which the approximately 147 adult establishments that will need to relocate can move, plaintiffs argue, the City has not carried its burden of proving that "reasonable alternative avenues of communication" exist under federal law.

Plaintiffs' argument suffers from several flaws. First, we are aware of no federal case, and plaintiffs direct our attention to

none, that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas that remain available and proving that such areas contain enough potential relocation sites that are "physically and legally available" to accommodate the adult establishments. This is precisely the standard of proof to which the New York Court of Appeals held the City. Clearly then, to second-guess that court's determination of this issue would violate the full faith and credit statute.

After observing that "it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available," Stringfellow's, 91 N.Y.2d at 403, 1998 N.Y. LEXIS 137, 1998 WL 77749, at *10, the New York Court of Appeals noted the City's evidence that, after excluding land identified by the City as being encumbered by properties unlikely to be developed for commercial use, 4% of the total land area of the City remained open to adult establishments. Maps prepared by the City reflected that, after factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available. See id. Further, the New York Court of Appeals considered the City's evidence that the zoning districts left open to adult establishments "permit a wide mix of commercial, retail, entertainment and manufacturing uses," id., and that all of these areas in Manhattan and 80% of the areas in the other boroughs of New York are within a ten-minute walk from a subway line or major bus route, see id.[6/]

[6/] The accessibility of potential sites in the so-called "outer boroughs" disposes of plaintiffs' argument--which, in any event, is without foundation and unsupported by case law--that in contrast to the state courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis.

The court did not ignore plaintiffs' evidence--namely, the McLaughlin Affidavit--that portions of the 4% of "unencumbered" land identified by the City were not realistically available, but rather found this evidence insufficient to raise a material question of fact regarding the availability of "reasonable alternative avenues of communication." The court partially discredited the McLaughlin Affidavit because McLaughlin considered land to be "unavailable" that, under Renton, is not to be excluded--such as industrial areas, undeveloped land, and warehouse areas. See Renton, 475 U.S. at 53-54 (finding available land to be adequate where it included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space," and observing that the fact that the establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation"); see also, e.g., Grand Brittain, Inc. v. City of Amarillo, Tex., 27 F.3d at 1069-70 (holding that adult-use zoning ordinance provided reasonable alternative avenues of communication even though 90% of prospective sites were on undeveloped land). The court also recognized that while the McLaughlin Affidavit identified, within the 4% of purportedly "unencumbered" land identified by the City, specific sites that were clearly not realistically available, this was insufficient to cast doubt upon the availability of "reasonable alternative avenues of communication" where the City had produced evidence showing that this land could accommodate over 500 establishments under the terms of the Zoning Amendment, approximately three times the number of establishments that currently exist:

The most significant flaw in McLaughlin's affidavit . . . is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his

estimate, unavailable.[7] To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Stringfellow's, 91 N.Y.2d at 404, 1998 N.Y. LEXIS 137, 1998 WL 77749, at *11; see also Stringfellow's, 171 Misc. 2d at 396, 653 N.Y.S.2d at 814 ("Even if the City's estimate overstates the number of potentially viable relocation sites, there still remains ample space for more than the existing numbers of adult establishments. . . . Nothing in Renton, Islip or any existing case law requires the City to identify specific sites that are actually available."); cf. Woodall v. City of El Paso, 49 F.3d at 1126 (stating, in response to complaints by

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[7] McLaughlin subsequently did quantify, in a new but substantially similar affidavit submitted to the district court, the number of sites he considered to be realistically available (90). However, in light of our agreement with the district court that plaintiffs had a full and fair opportunity to present evidence in state court, see infra, this belated submission does not affect our collateral estoppel inquiry. "A party . . . cannot avoid issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first." 18 James Wm. Moore, et al., Moore's Federal Practice § 132.02(2)(d), at 132-26 (3d ed. 1998); see, e.g., Yamaha Corp. v. United States, 295 U.S. App. D.C. 158, 961 F.2d 245, 254-55, 257 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078, 122 L. Ed. 2d 353, 113 S. Ct. 1044 (1993).

adult establishments as to the viability of particular sites, that "even if we agreed that . . . these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable").

In sum, there is no reason to doubt that the New York Court of Appeals applied the same standard and answered the same questions that apply under federal law in determining whether the Zoning Amendment provided for "reasonable alternative avenues of communication." The argument that federal law would have required the City to identify the precise sites to which adult establishments could relocate is not only unsupported by any federal case law, but is belied by our recent decision in Buzzetti. In Buzzetti, far from suggesting that the City's evidence was inadequate because it was not site-specific, we held that "there can be no doubt on this record that the Zoning Amendment allows for reasonable alternative avenues of communication." 140 F.3d at 140, 1998 WL 130866, at *8 (internal quotation marks omitted). Although we did not have the McLaughlin Affidavit before us in Buzzetti, the McLaughlin Affidavit is only relevant to whether plaintiffs have produced enough counter-evidence to cast doubt on the City's evidence, and it does not change the fact that under federal law the City was not required to identify precise relocation sites in order to prove the existence of "reasonable alternative avenues of communication." The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment--based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under Renton, and the persuasiveness of the City's own evidence--does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of

alternative sites in federal court.

C. Plaintiffs' Opportunity to Litigate the Issues in State Court

Collateral estoppel will only apply if plaintiffs had a "full and fair opportunity" in New York state court to litigate the issues that they now seek to relitigate in federal court. See In re Sokol, 113 F.3d at 306; Ryan, 62 N.Y.2d at 501, 478 N.Y.S.2d at 826, 467 N.E.2d at 490. Plaintiffs, as the parties opposing the application of collateral estoppel, bear the burden of proving that they were denied this full and fair opportunity. See In re Sokol, 113 F.3d at 306; Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). Under New York law, "[a] determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of the realities of the [prior] litigation, including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." Ryan, 62 N.Y.2d at 501, 478 N.Y.S.2d at 827, 467 N.E.2d at 491 (internal quotation marks and citation omitted; alterations in original). Included among the factors to be considered are "the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, [and] the competence and expertise of counsel." Id. Substantially for the reasons stated by Judge Cedarbaum, we believe that plaintiffs have not met their burden of proving that they were denied a full and fair opportunity to litigate their claims in state court. See Hickerson, 997 F. Supp. at ____, 1998 U.S. Dist. LEXIS 2635, 1998 WL 105583, at *5-6.

Accordingly, because the same issues decided by the state courts are dispositive of plaintiffs' claims under the First Amendment, and because plaintiffs had a full and fair

opportunity to litigate these issues in state court, they are collaterally estopped from relitigating them in federal court.

II.

Plaintiffs argue that they are not precluded from litigating their First Amendment claim in federal court because they informed the state court, pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964), that they intended to reserve the right to litigate their federal claims in federal court. England held that, after a federal court has abstained under the doctrine of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), in order to obtain an authoritative interpretation of state law that could potentially moot or influence the federal constitutional questions presented, parties who have been remitted to state court against their will are not forced to litigate their federal claims there, but may reserve the right to a federal adjudication of these claims. See 375 U.S. at 421-22. The Supreme Court in England stated its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." Id. at 415 (emphasis added).

Consistent with England's focus on the problem of depriving a litigant who has "invoked" the jurisdiction of a federal court from being deprived of that choice "without his consent and through no fault of his own," the Supreme Court appeared to suggest in a subsequent case that an England reservation would only be available when the federal courts were a litigant's initial forum of choice. See Allen v. McCurry, 449 U.S. 90, 101 n.17, 66 L. Ed. 2d 308, 101 S. Ct.

411 (1980) (characterizing England as applying "where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim" (emphasis added)). A similar suggestion was made in Migra v. Warren City School District Board of Education, 465 U.S. 75, 84-85 & n.7, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984). The question in Migra was whether litigants who could have, but did not, raise certain claims in their state case were precluded from raising those claims in a subsequent § 1983 suit in federal court. The Court held that such litigants were indeed so precluded, and relied heavily on the fact that such litigants voluntarily chose to proceed initially in state court. The petitioner in Migra, the Court observed, did "not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." Id. at 84-85. Having emphasized the voluntariness of the decision to file suit initially in state court, the Court then carefully noted that England provides a way for plaintiffs to return to federal court after a district court has abstained. See id. at 85 n.7. By contrasting England with the situation in which a plaintiff has chosen to file suit in state court even though he could have sought an adjudication of his federal constitutional claims in federal court, Migra can be read to suggest that England was not aimed at litigants who initially brought suit in state court. Cf. Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1306 (11th Cir. 1992) ("The Migra Court made clear that England could apply when a litigant with a federal constitutional claim is involuntarily in state court." (emphasis added)).

In the instant case, plaintiffs did not invoke the jurisdiction of the federal court in the first instance, only to have the court invoke Pullman abstention. Instead, they filed suit in state court, which they believed would look upon their free-speech claims more favorably. Moreover, after defendants removed

the case to federal court, plaintiffs moved to remand the case in its entirety (including their First Amendment claim) to state court, arguing that the case was not properly removable and also vigorously urging that their state constitutional claims "predominated," while their First Amendment claim was a mere "adjunct" or "supplement." See Affirmation on Behalf of Amsterdam Video Plaintiffs, in Support of Motion to Remand, dated April 26, 1996 (United States District Court for the Southern District of New York, No. 96 Civ. 2204), in Joint Appendix at 227. The district court, in response to plaintiffs' motion, abstained under Pullman and remitted the state claims to state court, but denied plaintiffs' request to remand the federal constitutional claims and instead stayed these claims pending the outcome of the state litigation. See 932 F. Supp. at 551. Only then did plaintiffs file an England reservation.

Under these circumstances, plaintiffs cannot meaningfully be said to have been deprived of a federal forum for their federal claims "without [their] consent and through no fault of [their] own." England, 375 U.S. at 415. If defendants had not sought to avail themselves of a federal forum after plaintiffs filed suit in state court, plaintiffs would have been held to their choice of forum and would have been required to submit their First Amendment claim to the New York state courts. The same would have been true if plaintiffs had been successful in moving to remand the entire case to state court. Alternatively, if plaintiffs' priority had been to obtain a federal forum for their First Amendment claim, they could have filed suit in federal court initially. Cf. Migra, 465 U.S. at 84-85 & n.7. In light of England's emphasis on the need to preserve access to a federal forum for those litigants who have chosen it, and in light of the suggestive characterizations of England by the Supreme Court in the later cases of Allen v. McCurry and Migra, we agree with those courts that have held that England applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants such as the

instant plaintiffs who voluntarily chose to file suit in state court. See Peduto v. City of North Wildwood, 878 F.2d 725, 729 n.5 (3d Cir. 1989) ("As plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of England has no relevance here."); Schuster v. Martin, 861 F.2d 1369, 1373-74 (5th Cir. 1988) (England "does not apply where the plaintiff voluntarily chooses to pursue a state action first."); Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306, 312 (1st Cir. 1986) ("In order to make an England reservation, a litigant must establish its right to have its federal claims adjudicated in a federal forum by properly invoking the jurisdiction of the federal court in the first instance."); cf. Fields v. Sarasota Manatee Airport Auth., 953 F.2d at 1304-05 (considering itself bound by predecessor-circuit decision, Jennings v. Caddo Parish Sch. Bd., 531 F.2d 1331, 1332 (5th Cir.), cert. denied, 429 U.S. 897, 50 L. Ed. 2d 180, 97 S. Ct. 260 (1976), allowing plaintiffs to file England reservation prior to bringing suit in federal court, but noting that "Jennings effectively abolishes the first requirement for an England reservation--filing in the first instance in federal court. Thus, it appears that the Jennings panel misread England, effectively rewriting the requirements for a valid England reservation."); see generally 17A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4243, at 6 (1998 Pocket Part) ("The England procedure strictly speaking is applicable only if a case was begun in federal court.").

We are not persuaded that a contrary result is required by footnote 13 of England, which contains some broad language seized upon by plaintiffs, but which we read simply to indicate that an England reservation is available not only to plaintiffs, but also to defendants who have removed the case to federal court, only to have the district court abstain. Footnote 13 states:

The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question. Thus, while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant. The latter may protect his right by either declining to oppose the plaintiff's federal claim in the state court or opposing it with the appropriate reservation.

England, 375 U.S. at 422 n.13. Despite plaintiffs' reliance on the statement that "once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question," we believe that it is clear, in context, that this footnote was only intended to clarify that England applies to defendants as well as plaintiffs, and that the particular language relied upon by plaintiffs was intended simply to clarify that a plaintiff may not, by fully litigating his federal claims in state court, deprive a defendant of his right to return to the federal forum. We do not read this language to render irrelevant a plaintiff's choice to avail himself of state, rather than federal, jurisdiction in the first instance, and we believe such a reading would contravene England's emphasis on preserving the federal forum for those who have "invoked" it but have been deprived of it "through no fault of [their] own." Id. at 415. Plaintiffs not only voluntarily filed suit in state court, but sought to remand the entire case to state court after it had been removed to federal court by defendants; while footnote 13 of England, under these circumstances, would have protected defendants from being deprived of their choice

of a federal forum, it does not allow defendants' choice of a federal forum to be preserved by plaintiffs.

III.

Apart from their reliance on England, plaintiffs raise several other arguments as to why collateral estoppel does not apply, each of which is without merit. First, citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984), plaintiffs argue that because their federal claim arises under the First Amendment, they are entitled to an independent examination of the record. In First Amendment cases, notwithstanding the "clearly erroneous" standard of factual review set forth in Fed. R. Civ. P. 52(a), "we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court." Bery, 97 F.3d at 693 (citing, inter alia, Bose Corp., 466 U.S. at 499). However, this rule only concerns the proper level of appellate review, and does not bar the application of collateral estoppel. See Ferris v. Cuevas, 118 F.3d 122, 125 n.3 (2d Cir. 1997) (citing Bose requirement, but noting, pursuant to finding plaintiffs' First Amendment claims that were not raised in prior state-court proceedings to be barred by res judicata, that "because our holding today is procedurally based and does not reach the merits . . . we do not conduct this higher level of factual review.").

Plaintiffs also rely on the doctrine that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." Montana, 440 U.S. at 159. They argue that such a change occurred when Mayor Rudolph W. Giuliani, one of the defendants in this action, stated at a press conference following the New York Court of Appeals' decision that the Zoning Amendment would "severely limit[]" the places adult establishments could relocate to, and would "reduce the

number in the city to something like 20 or 30." Text of Mayor Giuliani's City Hall Press Conference, February 24, 1998, in Joint Appendix at 914. Montana makes clear that the exception to collateral estoppel based on intervening changes in the factual record applies only when these changes "significantly" affect the overall complexion of the record. See 440 U.S. at 157; 18 James Wm. Moore, et al., Moore's Federal Practice § 132.02(2)(e), at 132-27 to -28 (3d ed. 1998) (in order to render issue preclusion inapplicable, "a difference in pertinent facts" must be "sufficient to substantially change the issue"). Mayor Giuliani's statements to the press, particularly when compared to the extensive legislative record compiled by the City--whose conclusions actually differ from those stated at Mayor Giuliani's press conference--simply do not meet that standard.

A final point that, in plaintiffs' view, counsels against the application of collateral estoppel, is that Supreme Court review is unavailable with respect to the New York state courts' determination of a question of state law. This argument fails to appreciate that the district court made a determination of federal law--namely, that the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment. If the district court's interpretation of the governing First Amendment standards were mistaken, and if this Court were mistaken in affirming the district court's interpretation of federal law, the Supreme Court would remain free to so find and to order this case to proceed in district court.

IV.

In sum, under the full faith and credit statute and New York's law of collateral estoppel, plaintiffs may not relitigate their First Amendment claim in federal court because the same issues that are dispositive of this claim have already been

decided in state court. Plaintiffs had a full and fair opportunity to litigate these issues in state court, and they raise no valid ground for barring the application of the doctrine of collateral estoppel. Accordingly, plaintiffs can show neither "a likelihood of success on the merits" nor "sufficiently serious questions going to the merits to make them a fair ground for litigation," and the district court's denial of plaintiffs' motion for a preliminary injunction was entirely proper. We have considered all of plaintiffs' other arguments, and find them to be without merit. The stay of Judge Cedarbaum's March 6, 1998 order is hereby vacated, the judgment of the district court is affirmed, and the Zoning Amendment may be enforced forthwith.

997 F. Supp. 418[1/]

RACHEL HICKERSON, et al., Plaintiffs

-against-

THE CITY OF NEW YORK, et al., Defendants

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Defendants-Intervenors,

***

AMSTERDAM VIDEO INC., et al.,

-against-

THE CITY OF NEW YORK, et al., Defendants,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Defendants-Intervenors.

96 Civ. 2203 (MGC), 96 Civ. 2204 (MGC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

March 9, 1998

[1/] The caption in this case is exactly the same as those of the federal court cases previously set forth in this appendix.

Beth Haroules, Esq., Arthur N. Eisenberg, Esq., Norman Siegel, Esq., NEW YORK CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Rachel Hickerson, et al., Plaintiffs.

Herald Price Fahringer, Esq., Erica T. Dubno, Esq., LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA, New York, New York, for Amsterdam Video Inc., et al., Plaintiffs.

JEFFREY D. FRIEDLANDER, Acting Corporation Counsel of the City of New York, Albert Fredericks, Esq., Gabriel Taussig, Esq., Elizabeth Natrella, Esq., New York, New York, for Defendants.

Frederick A. O. Schwartz, Jr., Esq., David A. Stoll, Esq., CRAVATH, SWAINE & MOORE, New York, New York, for Times Square Business Improvement District, Intervenor.

Wayne A. Cross, Esq., DEWEY BALLANTINE LLP, New York, New York, for Center for the Community Interest, et al., Intervenors.

OPINION

CEDARBAUM, District Judge:

Plaintiffs in these two actions move for a temporary restraining order and preliminary injunction staying enforcement of Text Amendment N 950384 to the Zoning Resolution of the City of New York (the "Amended Zoning Resolution"), which regulates the zoning of "adult

establishments."[2] The motion is denied for the reasons that follow.

In a case in which the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the issuance of a preliminary injunction requires the movant to demonstrate both irreparable harm and a likelihood of success on the merits. NAACP v. Town of East Haven, 70 F.3d 219, 223 (2d Cir. 1995). This standard is particularly appropriate where a municipal regulation has been carefully examined by all of the courts of the state, including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights.

A violation of the First Amendment of the Constitution of the United States is itself irreparable harm. Elrod v. Burns, 427 U.S. 347, 373-74, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). Accordingly, when an injunction is sought to protect First Amendment rights, likelihood of success on the merits and irreparable harm merge into a single threshold requirement. Preliminary injunctive relief is not warranted in this case because plaintiffs have not shown likelihood of success on the merits.

BACKGROUND

Plaintiffs in the Hickerson action are Manhattan and Bronx

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[2] Complete descriptions of the Amended Zoning Resolution can be found in this Court's prior opinion, Hickerson v. City of New York, 932 F. Supp. 550 (S.D.N.Y. 1996), and in Stringfellow's of New York, Ltd. v. City of New York, 171 Misc. 2d 376, 653 N.Y.S.2d 801 (N.Y. County 1996), aff'd, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), aff'd, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406, 1998 WL 77749 (N.Y. Ct. App. 1998).

residents who allege that they regularly patronize adult establishments. They claim that the Amended Zoning Resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. Plaintiffs in the Amsterdam action are owners and operators of business establishments which they allege are adult establishments as defined by the Amended Zoning Resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm.

Both groups of plaintiffs originally sued in the Supreme Court for New York County, asserting claims of violation of freedom of expression under the New York Constitution and the Constitution of the United States. Defendants, the City of New York and three city officials, removed the actions to this Court because of the federal questions presented by the complaints. Plaintiffs promptly sought to return to the state court by moving to remand the actions in their entirety. On June 27, 1996, plaintiffs' motions to remand were granted in part and denied in part. Under the doctrine of abstention of Railroad Commission v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), all of plaintiffs' state claims were remanded to New York County Supreme Court, while the federal claims were stayed pending resolution of the state claims. Hickerson v. City of New York, 932 F. Supp. 550 (S.D.N.Y. 1996).

State Court Proceedings

After remand of the state constitutional claims, defendants moved for summary judgment on those claims. Before defendants filed their summary judgment motion, plaintiffs conducted some discovery, including a deposition of Marilyn Mammano, a staff person at the Department of City Planning.

In support of summary judgment, defendants submitted a number of affidavits and virtually the entire legislative record of the Amended Zoning Resolution, including various studies and reports on adult businesses, the records of public hearings related to the Amended Zoning Resolution, and maps purporting to show permissible locations for the operation of adult establishments under the law. In opposition to the defendants' motion, plaintiffs submitted numerous affidavits and legal memoranda, including an extensive affidavit from a land use expert, R. Bruce McLaughlin. McLaughlin's affidavit addressed the availability of alternative sites for the businesses required by the Amended Zoning Resolution to close or relocate. It appears from McLaughlin's affidavit that he had been studying the matter for many months. According to the affidavit, McLaughlin personally visited every one of the more than 500 sites identified by the defendants as available for adult establishments. Moreover, documents attached to the affidavit included an analysis prepared in August 1995, while the Amended Zoning Resolution was under consideration and approximately one year before defendants moved for summary judgment.

On October 23, 1996, Justice Marylin G. Diamond of the New York County Supreme Court granted defendants' motion for summary judgment on plaintiffs' state constitutional claims. Stringfellow's of New York, Ltd. v. City of New York, 171 Misc. 2d 376, 653 N.Y.S.2d 801 (N.Y. County 1996), aff'd, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), aff'd, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406, 1998 WL 77749 (N.Y. Ct. App. 1998). Justice Diamond found that the Amended Zoning Resolution was not an attempt to regulate speech but rather was motivated by concerns other than those related to speech, and, in particular, by a reasonable belief that adult establishments produce undesirable secondary effects such as neighborhood deterioration, crime and

decreased property values. Justice Diamond found that, in enacting the Amended Zoning Resolution, the City reasonably relied on a number of studies undertaken in New York City and elsewhere concerning the secondary effects of adult establishments. She also found that the Amended Zoning Resolution is no broader than is necessary to address the negative effects associated with adult establishments.

Finally, Justice Diamond found that the Amended Zoning Resolution provides ample space for adult establishments, leaving almost 4% of New York City's total land area available for use by such establishments. She stated that defendants had "more than sufficiently demonstrated that the permissible areas are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. While plaintiffs have labored mightily to create issues of fact, none exist." Id. at 814. This conclusion was based in part on the specific analysis provided in the affidavit of William Bernstein, First Deputy Executive Director of the Department of City Planning, and other affidavits submitted by the defendants, who represented that approximately 500 potential relocation sites existed in New York City. She also considered McLaughlin's affidavit, which concluded that the actual number of available alternative sites was much smaller than the 500 or so claimed by the defendants. Justice Diamond found that McLaughlin's methodology was "fatally flawed" because it unjustifiably eliminated a number of sites based on factors that McLaughlin claimed make certain sites unavailable. Id. at 812. These factors included the undeveloped state of the proposed site, suitability for some "generic commercial enterprise," presence of a long-term lessee, current use as a parking lot and lease clauses prohibiting adult uses. Noting that such factors have been repeatedly rejected by state and federal courts, Justice Diamond found that McLaughlin and plaintiffs failed to rebut defendants' evidence that ample sites were available for the relocation of adult establishments.

In so doing, she stated:

Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP, he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.

Id. Justice Diamond rejected plaintiffs' contention that the defendants' estimate of 500 sites was invalid because it was generated by computer and not by inspection of the actual sites. She determined from the deposition testimony of Marilyn Mammano that the defendants' computation of alternative sites was properly calculated, based on conservative measurements, and, while not "site specific," was an acceptable estimate of the potential number of sites in the permissible areas. Id. at 812-813.

Finally, Justice Diamond rejected plaintiffs' request for additional discovery, because the administrative record before the court was "through, extensive and comprehensive." Id. at 813.

The decision of the New York County Supreme Court was unanimously affirmed by both the Appellate Division, 241 A.D.2d 360, 663 N.Y.S.2d 812 (1st Dep't 1997), and the New York Court of Appeals, 91 N.Y.2d 382, 694 N.E.2d 407, 671 N.Y.S.2d 406, 1998 WL 77749 (1998). Holding that the state constitutional standards governing regulations such as the Amended Zoning, Resolution are substantially the same as the federal standards, the Court of Appeals relied on both state and federal authority to hold that the Amended Zoning Resolution had a purpose unrelated to speech, imposed restrictions no broader than necessary to implement the

legitimate concerns of the legislature, and provided for reasonable alternative avenues of communication. Thus, after a thorough review of the record below, the Court of Appeals held that the resolution did not violate the state constitution and could be enforced by defendants. 671 N.Y.S.2d at , 1998 WL 77749, at *12.

On February 26, 1998, plaintiffs returned to this Court seeking a temporary restraining order and a preliminary injunction against the enforcement of the Amended Zoning Resolution.

DISCUSSION

Defendants contend that the doctrine of collateral estoppel precludes plaintiffs from relitigating in this Court the same factual issues that have already been tried and decided in the state court. The preclusive effect of a state court determination in a subsequent federal proceeding is governed by the rules of the state in which the prior action was tried. 28 U.S.C. § 1738; Allen v. McCurry, 449 U.S. 90, 96, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980); Sokol v. New York, 113 F.3d 303, 306 (2d Cir. 1997). Under New York law, a factual issue determined in a prior litigation is given preclusive effect if the issue to be precluded was necessarily decided in the prior litigation and the party opposing preclusion had a full and fair opportunity to litigate the issue. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826, 467 N.E.2d 487 (N.Y. Ct. App. 1984); Sokol, 113 F.3d at 306. Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979). Where factual determinations by a state court are at issue, collateral estoppel also "promote[s] the comity between state and federal courts

that has been recognized as a bulwark of the federal system." Allen, 449 U.S. at 95-96.

The First Amendment standard applicable to a content-neutral zoning ordinance regulating the location of adult entertainment businesses was established by the Supreme Court of the United States in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1985). Under Renton, zoning ordinances of the kind at issue in these actions are content neutral time, place, and manner regulations if the legislative purpose is other than the restriction of speech. According to Renton, such a content neutral ordinance is permissible if it is "designed to serve a substantial governmental interest" and "allows for reasonable alternative avenues of communication." Id. at 50.

Each of the inquiries set out by the Supreme Court in Renton -- the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication -- is a factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals. After extensive submissions by the parties, Justice Diamond held that (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Amended Zoning Resolution is "no broader than necessary" to prevent those adverse effects; and (4) defendants had "more than sufficiently demonstrated that the permissible areas" for adult establishments remaining in the City "are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate." 653 N.Y.S.2d at 803, 808, 809, 814.

Each of those inquiries was necessarily decided in the state court proceedings, and plaintiffs had a full and fair opportunity to litigate the issues in the state courts. Accordingly, if the doctrine applies, those issues are precluded from further litigation in this Court under the doctrine of collateral estoppel, now known as issue preclusion.

Plaintiffs offer no persuasive reason to be permitted to relitigate in this Court the very same issues they litigated in the state courts in order to persuade this Court to reach a different factual result. Plaintiffs contend that under England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964), they reserved their rights to relitigate these issues in federal court. The England case preserves a plaintiff's right to relitigate in federal court all issues related to the federal issues when the federal court is plaintiff's chosen forum, and plaintiff is forced, over its objection, to litigate those issues in state court because a federal judge sua sponte decides to abstain under Pullman. Here, however, plaintiffs' chosen forum was emphatically the state court. After plaintiffs filed these actions in state court, defendants removed them to this Court. Plaintiffs promptly moved to remand all their claims to the state court, and fought vigorously to return to their chosen forum, the state court. England does not govern or prohibit issue preclusion in these actions.

Plaintiffs also contend that they did not get a full and fair opportunity to litigate in state court. Under the New York law of issue preclusion, the party seeking preclusion has the burden of demonstrating the identity of the issues and that the issues were actually and necessarily decided in the prior litigation. The party opposing collateral estoppel has the burden of establishing the absence of a full and fair opportunity to litigate the issues in the prior action. Sokol, 113 F.3d at 306. A determination of whether a full and fair opportunity to

litigate was provided requires consideration of the "realities" of the prior litigation. The factors to be considered include: (1) the nature of the forum and the importance of the claim in the prior litigation; (2) the incentive to litigate and the actual extent of litigation; (3) the competence and experience of counsel; and (4) the foreseeability of future litigation. Ryan, 478 N.Y.S.2d at 827.

Plaintiffs complain that the actions were decided on summary judgment and after inadequate opportunity for discovery. Plaintiffs contend that their expert was not given adequate time to prepare his analysis of the purported alternative sites. Plaintiffs also argue that they were denied access to "critical information" such as how maps of permissible relocation areas were generated by the City. Finally, plaintiffs argue that they were not permitted to file a surreply after the City introduced new evidence and arguments on reply relating to the availability and suitability of potential sites.

The mere fact that a case is resolved on summary judgment and does not proceed to trial does not deny a party a full and fair opportunity to litigate. See, e.g., Tobias v. First City National Bank and Trust Co., 709 F. Supp. 1266, 1270-1271 (S.D.N.Y. 1989). Moreover, the "full and fair opportunity" requirement does not entitle a party to unlimited discovery. Indeed, state court proceedings permitting no discovery at all can be entitled to preclusive effect in federal court. McBride v. Bratton, 1996 U.S. Dist. LEXIS 16348, 1996 WL 636075, at *3 (S.D.N.Y. November 4, 1996), aff'd, 122 F.3d 1056 (2d Cir. 1997). It is undisputed that plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their extremely important effort to prevent New York City from requiring them to close and move their businesses. Plaintiffs were represented by experienced and highly competent counsel. They were

permitted some discovery, and had a full opportunity to press any procedural grievances in addition to their substantive claims in the state courts.

Plaintiffs were permitted to take the deposition of Marilyn Mammano, designated by defendants as the staff person familiar with the calculation made by defendants with respect to available alternative sites. Plaintiffs complain that Ms. Mammano was repeatedly directed not to answer questions, including questions related to the methodology of calculating the number of alternative sites and the suitability of alternative sites. Plaintiffs also complain that their requests for documents on these topics -- those reviewed by Ms. Mammano before the deposition, and other documents -- were denied. On the other hand, plaintiffs themselves point to a great deal of information from the Mammano deposition that they used to support their position in the state court, including testimony relating to the degree of defendant's investigation of alternative sites.

The New York courts themselves addressed plaintiffs' demands for discovery. Justice Diamond noted that plaintiffs' expert had had zoning maps for 10 months before he made his submission in opposition to defendants' motion for summary judgment, and that with those maps, he could have estimated the acreage size of the permissible zones. Nevertheless, he failed to calculate the number of potential relocation sites under his methodology. She also expressly addressed plaintiffs' claim that additional discovery was needed, "in view of the present administrative record that this court finds to be thorough, extensive and comprehensive." 653 N.Y.S.2d at 813. Moreover, the New York Court of Appeals noted that before issuing a decision, the New York County Supreme Court ordered defendants to respond to interrogatories served by the Hickerson plaintiffs, to provide maps of alternative sites that eliminated encumbered areas, and to produce Ms. Mammano for deposition. The record before Justice Diamond totaled

more than 10,000 pages, including pleadings, affidavits, exhibits and briefs. 671 N.Y.S.2d at , 1998 WL 77749, at *4.

In sum, plaintiffs have not shown that they did not have a full and fair opportunity to litigate ably and vigorously in the state courts the very factual issues that are dispositive of their claim under the First Amendment. Accordingly, the factual findings of the New York County Supreme Court as affirmed by the Appellate Division and the Court of Appeals are entitled to preclusive effect.

It should be noted that the zoning resolution attacked in this case under the First Amendment is before the Second Circuit in the case of Buzzetti v. City of New York, 1997 U.S. Dist. LEXIS 4383, 1997 WL 164284 (S.D.N.Y. April 8, 1997). That case has been argued before the Second Circuit and is pending decision in that court.

This order denying a preliminary injunction is stayed until the close of court business on Monday, March 9, 1998 so that plaintiffs can promptly seek from the Second Circuit a stay pending appeal.

SO ORDERED.

932 F. Supp. 550[1/]

RACHEL HICKERSON, et al., Plaintiffs

-against-

THE CITY OF NEW YORK, et al., Defendants

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Defendants-Intervenors,

***

AMSTERDAM VIDEO INC., et al.,

-against-

THE CITY OF NEW YORK, et al., Defendants,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Defendants-Intervenors.

96 Civ. 2203 (MGC), 96 Civ. 2204 (MGC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[1/] The caption in this case is exactly the same as those of the federal court cases previously set forth in this appendix, with two exceptions: at the time this opinion was rendered, Joseph Miele was named as defendant Commissioner of Buildings, Department of Buildings of the City of New York; The Center for the Community Interest's corporate name was the American Alliance for Rights and Responsibilities.

June 27, 1996

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, Attorneys for Plaintiffs Rachel Hickerson, et al., New York, New York, By: Beth Haroules, Esq., Norman Siegel, Esq., Christopher Dunn, Esq.

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA, Attorneys for Plaintiffs Amsterdam Video Inc., et al., New York, New York, By: Herald Price Fahringer, Esq., Erica T. Dubno, Esq.

PAUL A. CROTTY, Corporation Counsel of the City of New York, Attorney for Defendants, New York, New York, By: Albert Fredericks, Assistant Corporation Counsel, Gabriel Taussig, Assistant Corporation Counsel.

CEDARBAUM, J.

Plaintiffs in these two actions challenge the constitutionality of a recent amendment to the New York City zoning resolution which regulates the zoning of "adult establishments." Defendants, the City of New York and three City officials, removed the actions to this Court because the complaints assert claims under the United States Constitution as well as the New York State Constitution. Plaintiffs move to remand the actions, including the federal constitutional claims, to the state court. For the reasons that follow, these cases warrant abstention under the doctrine of Railroad Commission v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941). Accordingly, all of the claims arising under the New York Constitution are remanded to the Supreme Court of New York County. Remand of the federal claims is denied but the federal claims are stayed pending resolution of the state claims.

Background

The New York City Council adopted Text Amendment N 950384 ZRY (the "resolution") to the city zoning resolution on October 25, 1995. The resolution adds to the zoning resolution special provisions applicable to "adult establishments." It defines an adult establishment as "a commercial establishment where a 'substantial portion' of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof." Resolution § 12-10. (The resolution is attached to the Amsterdam complaint and also is Exhibit A to the Declaration of Albert Fredericks dated May 16, 1996.) Adult bookstores are defined as bookstores that have as a "substantial portion" of their stock-in-trade books, magazines, photographs, films, video cassettes, or other printed matter or visual representations that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'" Id. § 12-10(a). An adult eating or drinking establishment is an eating or drinking establishment that "regularly features" either live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities'"; films or other photographic reproductions that are "characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas'"; or "employees who, as part of their employment, regularly expose to patrons 'specified anatomical areas'"; and "which is not customarily open to the general public during such features because it excludes minors by reason of age." Id. § 12-10(b). An adult theater is a theater that "regularly features" films or other similar photographic reproductions that are "characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas'" or live performances that are "characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities,'"

and "which is not customarily open to the general public during such features because it excludes minors by reason of age." Id. § 12-10(c). Other adult commercial establishments are facilities that "feature[] employees who as part of their employment, regularly expose to patrons 'specified anatomical areas' and which is not customarily open to the general public during such features because it excludes minors by reason of age." § 12-10(d).

The resolution defines "specified sexual activities" and "specified anatomical areas." Id. § 12-10. It does not define "substantial portion" as that term is used in the definition of adult establishment and adult bookstore, but provides that

for the purpose of determining whether a "substantial portion" of an establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or combination thereof, the following factors shall be considered: (1) the amount of floor area and cellar space accessible to customers and allocated to such uses; and (2) the amount of floor area and cellar space accessible to customers and allocated to such uses as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. With respect to the definition of adult bookstores the resolution provides:

For the purpose of determining whether a bookstore has a "substantial portion" of its stock in materials defined in paragraphs (a)(1) or (a)(2) hereof, the following factors shall be considered: (1) the amount of such stock accessible to customers as compared to the total stock accessible to customers in the establishment; and (2) the amount of floor area and cellar space accessible to customers containing such stock; and (3) the amount of floor area and cellar space

accessible to customers containing such stock as compared to the total floor area and cellar space accessible to customers in the establishment.

Id. The resolution does not define the phrases "regularly features" or "characterized by an emphasis," which are used in the definitions of adult eating and drinking establishment and adult theater.

The resolution provides that adult establishments are not permitted in various zoning districts, including residential districts and some commercial and manufacturing districts. Id. §§ 32-01; 42-01; Fredericks Decl. P 8. It provides further that adult establishments must be located at least 500 feet from a church or school or another adult establishment. Resolution §§ 32-01(b) & (c); 42-01(b) & (c). Under the resolution, one adult establishment only is permitted on a single zoning lot and no adult establishment is permitted to exceed 10,000 square feet in floor area and cellar space. Id. §§ 32-01(d) & (e); 42-01(d) & (e). The resolution also includes special sign regulations for adult establishments. Id. §§ 32-69; 42-55.

Non-conforming adult establishments must, under the resolution, terminate within one year of the effective date of the resolution. Id. § 52-77. The resolution includes special "amortization" provisions, however, for owners of non-conforming establishments who have not recovered substantially all of their capital investment in the establishment (or non-conforming sign). Such owners may apply to the Board of Standards and Appeals for permission to continue for additional time sufficient for the owner to recover "substantially all of the financial expenditures incurred related to the non-conformity." Id. § 72-40.

The resolution became effective on November 1, 1995, less than one year ago. Accordingly, no establishment has yet been

required to close or move because of its provisions. Moreover, the resolution has not been construed by any court.

Plaintiffs in the first action (the "Hickerson plaintiffs") are Manhattan and Bronx residents who allege that they regularly patronize adult establishments. They claim that the resolution will prevent them from continuing to patronize the adult establishments they currently frequent, and will reduce significantly the number of alternative establishments available to them. The Hickerson plaintiffs contend that the resolution violates their rights to free expression. They assert three claims under article I section 8 of the New York Constitution and three claims under the First and Fourteenth Amendments to the United States Constitution. As their first cause of action, plaintiffs allege that the resolution intentionally restricts expression because it is directed at the "content and the time, place and manner of the messages conveyed in 'adult businesses,'" and that it is not necessary to advance a compelling interest and does not advance an interest in the least restrictive manner. (Hickerson Compl. PP 72-73.) As their second cause of action, the Hickerson plaintiffs claim that the resolution "fails to restrict expression by means 'no broader than necessary' to achieve a legitimate and important governmental objective." (Id. P 77.) As a third cause of action plaintiffs allege that the resolution violates article I section 8 of the New York Constitution in that it is too vague. (Id. PP 79-83.) As a fourth cause of action, plaintiffs assert that the resolution violates the First Amendment to the United States Constitution by failing to satisfy the requirements of City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). (Id. PP 84-90.) As a fifth cause of action, the complaint alleges that the resolution is a content-based restriction that is not narrowly tailored to serve a compelling government interest, in violation of the First Amendment. (Id. PP 91-94.) Finally, as a sixth cause of action, the complaint alleges that the resolution violates the

First and Fourteenth Amendments because it is too vague. (Id. PP 95-99.)

Plaintiffs in the second action (the "Amsterdam plaintiffs") are owners and operators of business establishments which they allege are adult establishments as defined by the resolution. They allege that the resolution will force them to terminate the operation of their businesses and thereby cause them significant economic harm. The Amsterdam plaintiffs assert fourteen causes of action, thirteen of which allege violations of the state constitution. Four causes of action elaborate different aspects of plaintiffs' claim that the resolution violates their rights to free expression under article I section 8. (Amsterdam Compl. PP 143-238.) Five causes of action assert that the resolution denies plaintiffs equal protection of the law in violation of article I section 11. (Id. PP 239-54, 274-92, 312-17.) The Amsterdam plaintiffs also assert two causes of action alleging that the resolution is unconstitutionally vague, (id. PP 270-73, 293-311), one cause of action alleging that the resolution grants an impermissible preference in favor of religion in violation of article I section 3, (id. PP 255-69), and one cause of action alleging that the amortization provisions of the resolution are inadequate and constitute an unconstitutional taking without just compensation in violation of article I section 7, (id. PP 318-31). As a fourteenth cause of action the Amsterdam complaint alleges that the resolution violates plaintiffs' rights to free speech and to equal protection of the law in violation of the First and Fourteenth Amendments to the United States Constitution. (Id. PP 332-43.)

Plaintiffs in both cases seek declaratory and injunctive relief. The Hickerson plaintiffs request in addition costs and attorneys' fees.

Pullman Abstention

Abstention is an extraordinary and narrow exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976) (citations omitted); see also Quackenbush v. Allstate Ins. Co., 135 L. Ed. 2d 1, 1996 U.S. LEXIS 3609, 64 U.S.L.W. 4379, 4382, 116 S. Ct. 1712 (June 3, 1996). Abstention is warranted only in "exceptional circumstances" in which the court's decision not to exercise its jurisdiction would "clearly serve an important countervailing interest." Colorado River, 424 U.S. at 813 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189, 3 L. Ed. 2d 1163, 79 S. Ct. 1060 (1959)). Federal courts are also obligated, however, to avoid deciding a federal constitutional question unless decision is "absolutely necessary to a decision of the case." Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J. concurring). Of particular relevance here is the well-settled rule that a case should be decided first on state law grounds in order to eliminate the need to decide a federal constitutional question. Siler v. Louisville & Nashville R.R., 213 U.S. 175, 53 L. Ed. 753, 29 S. Ct. 451 (1909).

In Railroad Commission v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), the plaintiffs challenged an order of the Texas Railroad Commission requiring railroad sleeping cars to be staffed by a person with the rank of Pullman conductor. All Pullman conductors were white, and all Pullman porters were African-American. Until the challenged order, Pullman porters were in charge of sleeping cars on trains carrying only one such car. The Pullman Company and the railroads argued in federal court that the order violated Texas law and the Equal Protection, Due Process, and Commerce Clauses of the United States

Constitution. Pullman porters intervened and claimed that the order unconstitutionally discriminated against them. The district court found in the plaintiffs' favor and enjoined enforcement of the order. Id. at 497-98.

The Supreme Court reversed, holding that the district court should have stayed its hand until the Texas courts had ruled on the state law question. The Court explained that the porters' federal claim raised a "more than substantial" constitutional question, which the federal courts ought to avoid unless "no alternative to its adjudication is open." Id. at 498. The Court then examined the Commission's power to issue the order under Texas law, and found that because the governing law was "far from clear," a decision by a federal court could not "escape being a forecast rather than a determination." Id. at 499 A ruling by a federal court would amount to only a "tentative decision" which could be "displaced tomorrow by a state adjudication." Id. at 500. Emphasizing that the plaintiffs appealed to the equitable powers of the federal court, the Court invoked the obligation of a court sitting in equity to exercise sound discretion in employing equitable remedies. It noted that "few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." Id. In view of the important policies of avoiding both constitutional questions and undue interference with state governments, the Court held that abstention from the constitutional claim was required, and remanded the case to the district court with instructions to stay the action pending proceedings in the state court to determine the validity of the order under state law. Id. at 501-502.

Under Pullman, "abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." Colorado River, 424 U.S. at 814 (quoting County of Allegheny, 360 U.S. at 189

(internal quotation marks omitted)). The relevant state law must be unclear to warrant abstention. E.g. Wisconsin v. Constantineau, 400 U.S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971); Reetz v. Bozanich, 397 U.S. 82, 25 L. Ed. 2d 68, 90 S. Ct. 788 (1970); Pullman. Abstention is not required in every case in which a plaintiff raises claims under both the federal constitution and "parallel state constitutional provisions." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 237 n.4, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). The Supreme Court has ordered abstention in several cases, however, in which a ruling by a state court as to whether the challenged statute violated the relevant state constitution could avoid the need for the determination of a federal constitutional question. Harris County Comm'rs Court v. Moore, 420 U.S. 77, 43 L. Ed. 2d 32, 95 S. Ct. 870 (1975); Reetz; City of Meridian v. Southern Bell Telephone & Telegraph Co., 358 U.S. 639, 3 L. Ed. 2d 562, 79 S. Ct. 455 (1959) (per curiam); see also Askew v. Hargrave, 401 U.S. 476, 28 L. Ed. 2d 196, 91 S. Ct. 856 (1971) (per curiam) (remanding for consideration of abstention under Pullman abstention principles explained in Reetz where plaintiffs alleged that Florida statute violated federal constitution and another action pending in state court challenged same statute under state constitution).

Plaintiffs' principal challenge to the resolution is their claim that the resolution violates their rights of free expression. The New York Court of Appeals has held that the New York Constitution protects rights to free expression that the First Amendment does not protect. See People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 510 N.Y.S.2d 844 (1986). Article I section 8 provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." This language is different from that of the First Amendment, which provides: "Congress shall make no law .

. . abridging the freedom of speech, or of the press . . . ." Plaintiffs raise substantial claims under the state constitution. These state constitutional claims should be determined before plaintiffs' claims under the federal constitution, because a ruling that the resolution violates the state constitution would obviate the need to decide the federal constitutional questions. See Pullman; Ashwander; Siler.

The state constitutional claims present questions whose resolution is "far from clear." Although the New York Court of Appeals decided in Town of Islip v. Caviglia that a zoning ordinance adopted by the Town of Islip to regulate adult establishments did not violate article I section 8, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215 (1989), it is uncertain how a New York court would apply that case to the resolution challenged here. The Islip ordinance governed bookstores, drive-in theaters, motels, theaters, and "peep shows" that were "not open to the public generally but excluded any minor by reason of age." 73 N.Y.2d at 562-63, 542 N.Y.S.2d at 149. Only the definitions of "adult entertainment cabaret" (which encompassed any "public or private establishment which presented topless dancers, strippers, male or female impersonators or exotic dancers, or other similar entertainments and which establishment [was] customarily not open to the public generally but excluded any minor by reason of age") and "massage establishment" made any reference to the subject matter of the books, films, or other materials stocked or "featured" by the adult establishment. By contrast, the resolution defines all of the affected establishments by reference to whether their wares or live performances or the activities of their employees emphasize "specified sexual activities" or "specified anatomical areas." In Caviglia, the Court of Appeals found that the ordinance did not require forty-three percent of adult establishments in the community to move, and that the town rezoned some land to permit an adult bookstore to remain at its pre-ordinance location.

Plaintiffs in these cases allege that the resolution will require more than eighty-four percent of existing adult establishments to move or close. The court found in Caviglia that substantial space in Islip was available for adult establishments, but plaintiffs here contend that insufficient alternative space is available for the large number of adult establishments in New York City. Because of these and other differences between the Caviglia case and these cases, the outcome of plaintiffs' state constitutional challenge is uncertain. As was true of the state law claims in Pullman, a federal court's judgment of the resolution's constitutionality under the state constitution would be a mere forecast rather than a determination. These claims should be decided by the state courts before any federal constitutional issue is reached.

Defendants argue that abstention is unwarranted because the federal constitutional claims do not logically depend on the state constitutional claims. (Def. Mem. at 14.) But the federal claims in Pullman also did not depend on the state law claim raised there. Abstention is appropriate because plaintiffs have brought claims under a provision of the state constitution that differs from the provision of the federal constitution on which they rely, the state constitutional law is not settled, and resolution of the claims under the state constitution may avoid the need for a determination of the federal constitutional questions.

In addition, plaintiffs' claims that the resolution is unconstitutionally vague depend on interpretation of a new resolution that has not been construed by any court. The meaning of phrases in the resolution such as "substantial portion" and "regularly feature" are not at once apparent. A federal court should not be the first to construe these provisions. Abstention is warranted to give the New York courts an opportunity to construe the resolution, for the courts could interpret these phrases in such a way as to change or

eliminate the vagueness claims. Greater New York Metro. Food Council v. McGuire, 6 F.3d 75 (2d Cir. 1993) (per curiam).

For all of these reasons, these cases present exceptional circumstances which require abstention. The state claims are remanded to state court, and the federal claims are stayed until conclusion of the state litigation.

Burford Abstention, Remand, and Supplemental Jurisdiction

As explained above, plaintiffs' state constitutional claims are remanded and the federal claims stayed. Plaintiffs, however, want more. They seek to have their federal constitutional claims adjudicated by a state court. Plaintiffs argue that the doctrine of Burford abstention and 28 U.S.C. § 1441(c) both authorize remand of the claims arising under the Constitution of the United States. In addition, the Amsterdam plaintiffs suggest that remand is authorized by 28 U.S.C. § 1367.

Only extraordinary circumstances justify a federal court's refusal to decide claims that fall within its original jurisdiction. The court's responsibility to exercise jurisdiction is especially strong when, as here, substantial claims under the federal constitution are presented. Plaintiffs argue that this obligation is limited to the duty to protect a plaintiff's right to have federal constitutional claims adjudicated by a federal court. Plaintiffs reject defendants' correlative right to a federal forum.

Plaintiffs are the masters of their complaints, and these plaintiffs could have assured themselves a state forum by bringing only claims arising under state law. Plaintiffs are, of course, entitled to raise any claim for which they have a good faith basis. But if plaintiffs choose to assert claims under the Constitution of the United States, defendants are entitled to

remove the case to federal court. 28 U.S.C. § 1441(a) (1994).

The City of New York and its officials are entitled to have their responsibilities under the federal constitution determined by a federal court. Although I have held that exceptional circumstances are present which justify staying the federal claims until the state courts have decided the state constitutional claims, the circumstances that would justify a decision entirely to relinquish the federal claims do not exist. That is, the circumstances justify delaying decision on the federal claims, but not complete abdication. For the reasons explained below, the authority on which plaintiffs rely does not provide a basis for remand of the federal constitutional claims.

1. Burford Abstention

In Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943), the Supreme Court held that the district court, as a matter of sound equitable discretion, should have declined to exercise jurisdiction over the plaintiff's due process challenge to an order of the Texas Railroad Commission. The Commission's order, which granted the defendant the right to drill certain oil wells, was issued pursuant to a statute empowering the Commission to regulate oil production in Texas. Because of the detailed, comprehensive regulatory scheme involved, the Court held that the district court should have abstained. The Court noted that if federal courts were available for review of the Commission's orders, "delay, misunderstanding of local law, and needless federal conflict with the state policy" would inevitably result, id. at 327, and that oil production involved "basic problems of Texas policy," id. at 332. The Court described the Texas courts as "working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." Id. at 326. The Court concluded that such challenges should be left to the

state courts to be handled as "one more item in a continuous series of adjustments." Id. at 332 (citation omitted).

The Court has since described the doctrine of Burford abstention as follows:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (quoting Colorado River). The Second Circuit has held that "the aim of Burford abstention is to avoid resolving difficult state law issues involving important public policies or avoid interfering with state efforts to maintain a coherent policy in an area of comprehensive regulation or administration." Bethphage Lutheran Serv., Inc. v. Weicker, 965 F.2d 1239, 1243 (2d Cir. 1992) (citations and internal quotation marks omitted).

Plaintiffs argue that Burford abstention is warranted because "the question of zoning needs is an issue of local land use policy and, therefore, is more properly considered in the first instance by the state court." (Hickerson Pls. Mem. at 7, Amsterdam Pls. Mem. at 19 (quoting Rose v. Village of Upper Nyack, 669 F. Supp. 654, 656 (S.D.N.Y. 1987)).) Plaintiffs contend that decision by a federal court would disrupt the City's efforts to establish a coherent zoning scheme for adult

establishments.

Burford abstention cannot be justified in the cases before the Court. They are not challenges to discrete orders under a comprehensive regulatory scheme as in Burford. If decision of the federal constitutional claims becomes necessary, a federal court will not be required to resolve difficult questions of state law, because plaintiffs attack an entire scheme under the Constitution and the state courts will have already construed the resolution. Decision by a federal court also would not disrupt the City's efforts to establish a coherent policy. Indeed, it would make little sense to hold that federal court adjudication would unduly interfere with local policy when it is the local government defendants who brought the case to federal court, and who seek to keep it here. Burford abstention is not appropriate.

2. Remand - 28 U.S.C. § 1441(c)

Plaintiffs contend that 28 U.S.C. § 1441(c) authorizes remand of these actions in their entireties, including the federal claims. Section 1441(c) was amended in 1990 by the Judicial Improvements Act. Prior to its amendment, this section provided:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1988). The provision now reads as follows:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c) (1994).

Plaintiffs rely on the last clause of the amended provision, which now authorizes remand of all "matters" in which state law predominates. Plaintiffs contend that Congress changed the language to permit district courts to remand an entire case that includes a federal claim when state law predominates in the case as a whole.

Plaintiffs' argument is not persuasive. First, section 1441(c) does not apply to these cases because plaintiffs' federal claims are not "separate and independent" from their state law claims. Prior to 1990, the Supreme Court held that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14, 95 L. Ed. 702, 71 S. Ct. 534 (1951). The Court observed in Carnegie-Mellon University v. Cohill that federal claims are not separate and independent from pendent claims such as plaintiffs' state constitutional claims. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 354, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988). Congress left this "separate and independent" language unchanged when it amended the statute, and therefore the provision continues to be inapplicable to cases comprised of federal question claims and pendent state claims. Borough of West Mifflin v. Lancaster, 45 F.3d 780 (3d Cir. 1995).

Second, even in those cases to which it applies, section 1441(c) does not authorize remand of federal claims. The sparse legislative history relating to the phrase on which plaintiffs rely provides little guidance except that it contains no indication of an intention to effect a radical change in federal question jurisdiction. It is not clear what Congress meant by "matters in which State law predominates." Congress was aware, however, of the federal courts' strong view of their obligation to exercise jurisdiction over federal claims properly before them, and it is extremely unlikely that Congress would have used such ambiguous language to accomplish so significant a change in federal jurisdiction. Some district court decisions, on which plaintiffs rely, have concluded that the revised provision does authorize remand of entire cases including federal claims. Moralez v. Meat Cutters Local 539, 778 F. Supp. 368 (E.D. Mich. 1991); Alexander by Alexander v. Goldome Credit Corp., 772 F. Supp. 1217 (M.D. Ala. 1991); Moore v. DeBiase, 766 F. Supp. 1311 (D.N.J. 1991); Holland v. World Omni Leasing, 764 F. Supp. 1442 (N.D. Ala. 1991); Martin v. Drummond Coal Co., 756 F. Supp. 524 (N.D. Ala. 1991). The better view, however, is that it does not. See Buchner v. Federal Deposit Ins. Corp., 981 F.2d 816 (5th Cir. 1993); Kabealo v. Davis, 829 F. Supp. 923 (S.D. Ohio 1993), aff'd, 72 F.3d 129 (6th Cir. 1995). History, language, and logic compel the conclusion that under section 1441(c), the phrase "matters in which State law predominates" does not encompass federal claims.

Finally, even if I had discretion under this statute to remand plaintiffs' federal constitutional claims, I would not do so. Plaintiffs have raised claims under the First Amendment; their allegations that the resolution also violates the state constitution do not diminish the importance of the federal constitutional issues. A "matter" that includes a substantial federal constitutional claim cannot be a matter in which state law predominates.

3. Supplemental Jurisdiction - 28 U.S.C. § 1367

The Amsterdam plaintiffs appear to contend that 28 U.S.C. § 1367 authorizes remand of the federal as well as the state law claims in these actions. Also enacted as part of the Judicial Improvements Act of 1990, section 1367 codifies the doctrines of pendent and ancillary jurisdiction, now called "supplemental" jurisdiction. Subsection (a) of the statute provides:

In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (1994). Subsection (c) provides that "the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)" under certain circumstances. § 1367(c). Nothing in section 1367 authorizes a district court to dismiss or remand any claim over which the district court has original jurisdiction, including claims arising under the United States Constitution.

For all of the reasons stated above, plaintiffs' motions to remand the claims arising under the United States Constitution are denied.

Motions for Intervention

Forty-eight individuals and organizations move to intervene as defendants in these actions. In light of my decision to abstain, the motions for intervention are denied as premature, subject to renewal when these cases are reopened following the

conclusion of the state proceedings and without prejudice to motions for intervention in the state proceedings.

Conclusion

For the foregoing reasons, the motions to remand are granted in part and denied in part. All claims arising under the Constitution of New York are remanded to the Supreme Court of New York County. All claims arising under the Constitution of the United States are stayed pending determination of the state claims in state court. The motions for intervention are denied without prejudice.

SO ORDERED.

STRINGFELLOW'S OF NEW YORK, LTD., Appellant,

v.

THE CITY OF NEW YORK, HON. RUDOLPH W. GIULIANI, as Mayor of the City of New York, JOSEPH B. ROSE, as Director of City Planning, Department of City Planning of the City of New York, and GASTON SILVA, as Commissioner of Buildings, Department of Buildings of the City of New York, Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, BELLAIRE/BELL-VILL CIVIC ASSOCIATION, BNOS ISRAEL GIRLS' SCHOOL, BOWNE PARK CIVIC ASSOCIATION, BRIARWOOD COMMUNITY ASSOCIATION, BRONX COMMUNITY BOARD # 12, BROOKLYN CIVIL COUNCIL, BROOKLYN TENANTS COUNCIL, CARDINAL SPELLMAN HIGH SCHOOL, COALITION OF UNITED RESIDENTS FOR A SAFER ENVIRONMENT, COLLEGE POINT BOARD OF TRADE, COMMITTEE FOR A BETTER AND SAFER NOSTRAND AVENUE, COMMUNITIES OF MASBETH AND ELMHURST TOGETHER, COMMUNITY SCHOOL DISTRICT 21 PRESIDENTS' COUNCIL, CONGREGATION BNAI SHLOIMA ZALMAN, CROWN HEIGHTS TAXPAYERS AND CIVIC ASSOCIATION, DOUGLASTON CIVIC ASSOCIATION, EAST MIDWOOD NEIGHBORHOOD ASSOCIATION, COUNCILMEMBER ANDREW ERISTOFF, GRAND CENTRAL PARTNERSHIP, HOLLISWOOD CIVIC ASSOCIATION, HUDDE JUNIOR HIGH SCHOOL PARENTS ASSOCIATION, JACKSON HEIGHTS COMMUNITY DEVELOPMENT CORPORATION, KINGS HIGHWAY DISTRICT

MANAGEMENT ASSOCIATION, KINGSWAY JEWISH CENTER; LAWYERS' COMMITTEE ON VIOLENCE, MANHATTAN TERRACE CIVIC ASSOCIATION, COUNCILMEMBER HELEN MARSHALL, MIDWOOD CIVIC ACTION COUNCIL INC., NEW NORTHERN BOULEVARD BUSINESS ASSOCIATION, NORTHERN BOULEVARD MERCHANTS' ASSOCIATION, 100-299 EAST 77TH STREET BLOCK ASSOCIATION, PROSPECT PARK YESHIVA, QUEENS BRADDOCK CIVIC ASSOCIATION, QUEENS VILLAGE CIVIC ASSOCIATION, REAL ESTATE BOARD OF NEW YORK, RESIDENTS AGAINST STREET PROSTITUTION, ROSEDALE BLOCK ASSOCIATION, ROSEDALE CIVIC ASSOCIATION, COUNCILMEMBER JOHN SABINI, 34TH STREET PARTNERSHIP, UNITED CIVIC COUNCIL OF QUEENS, UNITED COMMUNITY CIVIC ASSOCIATION, COUNCILMEMBER ANTHONY WEINER, WEST 45TH STREET BLOCK ASSOCIATION, WEST 47TH/WEST 48TH STREET BLOCK ASSOCIATION and WEST 90'S/WEST 100'S NEIGHBORHOOD COALITION, Intervenors-Respondents.

AMSTERDAM VIDEO INC., A & X ENTERTAINMENT INC., d/b/a Playpen II, ADULT VIDEO, INC., ASCOT SPACE AMUSEMENT, INC., d/b/a Ascot Theatre, BIG APPLE CINEMAS INC., d/b/a Show Follies Theater, BRETT DISTRIBUTORS, INC., d/b/a Media Distributors, CAPRI CINEMA INC., CAPWELL ENTERTAINMENT, INC., d/b/a Legz Diamond's Playhouse, CHURCH STREET CAFE INC., d/b/a Baby Doll Lounge, COLLEGE PT. REST. CORP., d/b/a Gallagher's II, CRAZY FANTASY VIDEO, INC., CUPID'S TREASURES, INC., d/b/a Banana Video and Unicorn, DARA DISTRIBUTORS INC., d/b/a Love Shack, DESIRE VIDEO INC., E & A BOOKS, INC., E & A VIDEO AND MAGAZINE INC., ED-MART BAR & GRILL INC., d/b/a

Penny Whistle, FOR THE PEOPLE THEATRES OF N.Y., INC., d/b/a Fair Theatre, FOUR KEYS ENTERPRISES, INC., d/b/a Hollywood Peepshows, FOURTEENTH ST. ENTERPRISES INC., d/b/a All Male Adult Video, FUN CITY VIDEO CORP., G & D MERCHANDISE CORP., d/b/a Peepland, GOTHAM EXHIBITOR INC., d/b/a Peep O Rama, HELEN WOLFF LTD., d/b/a Come Again, I.S. SULTARS INC., J & J TUMMY YUMMIES CORP., d/b/a Naked City, JGJ MERCHANDISE CORP., d/b/a Peepland/Valentina's II, JHM VIDEO CORP., JUM OPERATING CORP., d/b/a Peepland, JVR VIDEO CENTER INC., d/b/a Playground, KINEMATICS MERCHANDISING & DISTRIBUTORS, INC., d/b/a Kinematics, KISMA VIDEO, INC., L & T VIDEO, INC., d/b/a Badlands Adult Video, MADELINE D'ANTHONY ENT. INC., d/b/a Harmony Theatre, MANHATTAN VIDEO INC., MARQUIS VIDEO INC., d/b/a Marquis Video, MIRAGE PRODUCTIONS INC., d/b/a Love Shack, MONTANA HOLDINGS INC., d/b/a Runway 69, NAWAN ENTERTAINMENT INC., d/b/a Euro World, NILUPUL VIDEO INC., N.R.S. VIDEO INC., NY VIDEO INC., d/b/a Love Shack, PABON THEATRE CORP., d/b/a Eros Theatre, PEREGRINE ENTERPRISES, INC., d/b/a Paradise Club, R.E.J.M., INC., d/b/a Big Top, RON BOB PUB INC., d/b/a Gallagher's, SAMI'S VIDEO WAREHOUSE, d/b/a Warehouse on the Block, LTD, SERENDIB VIDEO INC., d/b/a Serendib Video, SPH VIDEO CORP., STAR DISTRIBUTORS, LTD, STATEWIDE VIDEO INC., STEAM HEAT INC., STS VIDEO INC., d/b/a Adult Video, SUEMAR VIDEO, INC., d/b/a Goodtime Video, THIRD AVENUE ENTERTAINMENT INC., d/b/a XXX Video, THUNDER VIDEO INC., TOWN VIDEO SALES, INC., d/b/a Les Hommes Book Shop, VIDEO, VIDEO, VIDEO, INC., VIDEO 30 OF QUEENS INC., d/b/a Ecsxxxtasy Video, WEST VIDEO INC., ZIDEO VIDEO INC., 21 ANN STREET CORP., d/b/a Ann Street Adult Entertainment, 130 C STREET CORP., d/b/a Christopher

Street Book Shop, 155 VIDEO CENTER CORP., d/b/a Peepworld, 300 BOOK CENTER, 303 W.42ND STREET ENTERPRISES INC., d/b/a Show World, 323 CANAL ST. INC., 325 W. 45TH ST. REST. CORP., d/b/a Private Eyes, 35-30 38th St. Corp., d/b/a Cityscape, 412 8TH AVE. CORP., d/b/a Nude New York City, 45-08 VERNON BLVD. CORP., d/b/a Riverhead Inn, 603 VIDEO INC., 610 VIDEO STORE INC., 691 8TH AVENUE CORP., 691 VIDEO CENTER CORP., 693 VIDEO CORP., d/b/a TNL Video, 711 ASSOCIATES LTD., d/b/a Peepland, 729 6TH AVENUE CORP., d/b/a Billy's Topless, 733A CORP., d/b/a Video Palace, 763 VIDEO STORE INC., 777-779 8TH AVE. CORP., d/b/a Hollywood Twin, 81-22 BAXTER AVE. LOUNGE INC., d/b/a ILDA'S PLACE II, Appellants,,

v.

THE CITY OF NEW YORK, et al., Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Respondents.

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, and ELLIOT STAMLER, Appellants,

v.

THE CITY OF NEW YORK, et al., Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Respondents.

February 24, 1998

COUNSEL: No. 17:

Mark J. Alonso, for appellant Stringfellow's.

Leonard Koerner, for City respondents.

Frederick A.O. Schwarz, Jr., for intervenor-respondent Times Square.

Wayne A. Cross, for all other intervenors-respondents.

Association of the Bar of the City of New York, amicus curiae.

No. 18:

Herald Price Fahringer, for appellant Amsterdam Video.

Leonard Koerner, for City respondents.

Frederick A.O. Schwarz, Jr., for intervenor-respondent Times Square.

Wayne A. Cross, for all other intervenors-respondents.

Council of Regulated Adult Liquor Licensees; First Amendment Lawyers Association; and Association of the Bar of the City of New York, amici curiae.

No. 19:

Arthur N. Eisenberg, for Hickerson appellants.

Leonard Koerner, for City respondents.

Frederick A.O. Schwarz, Jr., for intervenor-respondent Times Square.

Wayne A. Cross, for all other intervenors-respondents.

First Amendment Lawyers Association; and Association of the Bar of the City of New York, amici curiae.

TITONE, J.:

This appeal concerns the validity of New York City's Amended Zoning Regulation governing the location of adult entertainment establishments throughout the five boroughs. We conclude that on this record the Supreme Court correctly granted summary judgment declaring that the challenged ordinance does not violate plaintiffs' constitutional rights of free expression.

I. Factual Background

The "adult" establishments at the center of this controversy offer various forms of sexual expression. These businesses include bookstores, theaters, stores dealing in videotaped material and places of live entertainment. In 1965, there were only nine such establishments in New York City. That figure has fluctuated over the past thirty years, but the last decade has experienced a steady growth in the industry, with sections of Manhattan and Queens showing the greatest development. By 1993, there were 177 adult establishments operating in New York City: 107 in Manhattan, 44 in Queens, 15 in Brooklyn, eight in the Bronx and three in Staten Island.

In September of 1993, the Department of City Planning (DCP) undertook an evaluation of the impact of such property uses on urban life. Published in September 1994, the DCP study was divided into two parts. First, the DCP examined

similar studies conducted in nine other localities: Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota. The DCP found evidence in these reports that adult businesses often have such negative secondary impacts as increased crime rates, depreciated property values and deteriorated community character. The DCP also sought to identify the specific adverse secondary effects caused by adult establishments in New York City itself. To accomplish that goal, the DCP both conducted its own independent analysis of six selected areas in the City and examined other earlier studies of the City's adult uses. Among the other materials examined were a 1977 report by the City Planning Commission (CPC); a 1983 Annual Report of the Mayor's Office of Midtown Enforcement; a 1993 study conducted by the Chelsea Action Coalition and Manhattan Community Board 4; testimony at an October 1993 public hearing before the Task Force on the Regulation of Sex-Related Businesses; an April 1994 Times Square Business Improvement District (TSBID) study; and a 1993 survey compiling media accounts and complaint correspondence to City agencies.

The DCP's independent study confirmed that the number of adult establishments in the City had increased considerably in recent years. The DCP further found that as adult uses proliferated, they tended to cluster. In Manhattan, for example, adult businesses were concentrated in central locations such as the Times Square area. In the other boroughs, such businesses lined major vehicular routes such as Queens Boulevard in Queens and Third Avenue in Brooklyn. Additionally, the vast majority of adult establishments were located in zoning districts that permitted residential development.

Based on the material before it, the DCP determined that there were significant adverse impacts attributable to adult

enterprises in the City, including downward pressure on property values and increased crime rate in areas where adult uses are most concentrated. A pivotal finding of the DCP was that a large majority of surveyed business and community organizations believe that their neighborhoods are adversely affected by the presence of adult uses and that this perception itself leads to disinvestment and a marked decline in economic and pedestrian activity.

II. The Challenged Ordinance

The Zoning Resolution of the City of New York, adopted on December 15, 1960, regulates commercial establishments in the City. Historically, the Resolution did not distinguish between adult establishments and other commercial ventures. Like other businesses, adult enterprises simply had to satisfy the requirements for the particular "use group" into which they were classified. Consequently, adult uses were permitted in most of the City's commercial and manufacturing districts, which frequently also allowed residential development or were mapped close to residential districts.

Prompted by the findings and final recommendation of the DCP study that adult establishments should be regulated differently from other commercial establishments because of their unique negative effects, the City Planning Commission (CPC) directed the DCP in November of 1994 to draft a set of adult use zoning restrictions. Concomitantly, the City Council imposed a one-year moratorium on the creation or enlargement of adult-use establishments.

On March 21, 1995, the DCP and the City Council Land Use Committee jointly sought to amend the Zoning Resolution and establish a permanent and comprehensive set of regulations governing adult uses. Over the next several months, the City's 59 community boards, five borough boards

and borough presidents, the CPC and the City Council reviewed the proposed amendments and conducted public hearings. On September 18, 1995, the CPC approved the proposed amendments, noting that they were "an appropriate and necessary response to the adverse secondary effects stemming from adult establishments" and that they nonetheless continue "to provide ample opportunity for adult establishments to locate and operate throughout New York City." After further public hearings and debate, the City Council gave final approval to Text Amendment N 950384 ZRY on October 25, 1995.

As adopted by the City Council, the amendments are applicable to any "adult establishment," defined as those commercial enterprises in which a "substantial portion" of the premises are used as an "adult book store," an "adult eating or drinking establishment," an "adult theater" or "other adult commercial establishment" (Amended Zoning Resolution § 12-10). Covered facilities are those within the foregoing four categories that "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities" (id.). "Adult eating and drinking establishments," "adult theaters" and "other adult commercial establishments" are covered only if they exclude minors because of their age (id.).

The Amendments to the zoning code include an array of site limitations and anti-clustering provisions. Under provisions that pre-date the Amendments, new commercial establishments, including new adult establishments, are barred from the City's residential zones. Under the Amendments, adult establishments, new and old, are now also barred from certain districts that are zoned for manufacturing and commercial use but also permit residential development. The regulated uses are permitted in all other manufacturing districts

and in all high-density, general commercial districts (id., at §§ 32-01[a], 42-01[a]).

Within those districts where adult uses are authorized, the adult establishment must be located at least 500 feet from schools, houses of worship, day care centers, other adult uses and zoning districts where new residential development is allowed (id., at §§ 32-01[b], 42-01[b]). In addition, no more than one adult establishment may be located on a single zoning lot, and these establishments cannot exceed 10,000 square feet of usable floor area and cellar space (id., at §§ 32-01[d] & [e], 42-01[d] & [e]). The amendments also impose restraints on the size, placement and illumination of accessory business signs (id., at §§ 32-69, 42-55).

Any adult establishment operating in a prohibited location must either conform or terminate its business within one year of the Amendments' effective date (id., at §§ 52-77, 52-734). An exception to this termination requirement is available for existing businesses which are non-compliant only because (1) their area exceeds 10,000 square feet, (2) they are located on a zoning lot with another adult use, or (3) they are situated less than 500 feet from another adult establishment (id., at §§ 32-01[f], 42-01[f]). Another narrow exception is made for otherwise conforming adult uses that fall out of compliance because of the subsequent siting of a school or house of worship within 500 feet of their boundaries (§§ 32-01[b], 42-01[b]). Lastly, adult establishments faced with the one-year termination deadline can apply for an extension to the Board of Standards and Appeals, which may permit the applicant to remain open for a limited time to amortize any substantial and unrecovered costs associated with the adult portion of the establishment (id., at § 72-40).

III. Procedural History

On February 27, 1996, the Amsterdam Video plaintiffs, consisting of more than 100 owners and operators of adult establishments in the City, and the Hickerson plaintiffs, consisting of four patrons of such establishments, commenced actions in Supreme Court, New York County, against the City and related officials. Plaintiffs alleged that the Amended Zoning Resolution deprived them of their right to free expression protected by Article I, § 8 of the New York State Constitution and the First Amendment to the United States Constitution. Plaintiffs sought relief in the form of a judgment declaring the zoning Amendments unconstitutional and enjoining their enforcement.

Defendants removed the case to the United States District Court for the Southern District of New York, but on plaintiffs' application the court remanded plaintiffs' causes of action grounded in the State Constitution, retaining jurisdiction over the federal claims (932 F. Supp. 550). Subsequently, Stringfellow's, a cabaret featuring topless dancers, separately challenged the constitutionality of the amendments and sought injunctive relief. Supreme Court then granted the intervention motions of TSBID, the Center for Community Interest, and 45 other community groups, business organizations and local elected officials and consolidated the actions for hearing.

On August 26, 1996, defendants moved for summary judgment. The Amsterdam Video and Stringfellow's plaintiffs cross-moved for summary judgment; the Hickerson plaintiffs opposed defendants' motions but declined to cross-move for summary judgment on the theory that the case involved material factual disputes warranting a trial. Before issuing its decision, Supreme Court ordered additional discovery, in particular directing defendants to answer interrogatories served by the Hickerson plaintiffs, to provide maps to demonstrate the areas where adult uses would be permitted when encumbered areas were eliminated, and to produce for a deposition a

person familiar with the DCP's calculation of the total number of alternative sites that would be available to relocated adult establishments under the Amendments. A voluminous record of pleadings, affidavits, exhibits and briefs totaling more than 10,000 pages was before the court on the various summary judgment motions.

On October 23, 1996, Supreme Court granted defendants' motions for summary judgment and declared that "the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression guaranteed under the State Constitution and is, therefore, constitutional" (Stringfellow's of New York, Ltd. v. City of New York, 171 Misc. 2d 376, 653 N.Y.S.2d 801). Applying the test articulated by this Court in Matter of Town of Islip v Caviglia (73 N.Y.2d 544, 558-559, 542 N.Y.S.2d 139, 540 N.E.2d 215), Supreme Court first concluded that the Amendments were content neutral. The court found in the City's planning studies sufficient evidence of adverse secondary effects to support use of its zoning authority to address a serious neighborhood problem. Additionally, the court held that the Amendments were no broader than necessary to achieve their stated purpose, with zoning being the most appropriate response to address existing and anticipated future problems. Further, in the court's view, defendants had sufficiently demonstrated that the number of potential relocation sites under the Amended Zoning Resolution was more than adequate to accommodate the existing number of businesses. Plaintiffs' claim of a lack of available alternative sites, in contrast, was speculative and rested on discredited theories. Thus, the court concluded, no issues of material fact existed requiring a trial. The Appellate Division unanimously affirmed (Stringfellow's of New York, Ltd. v. City of New York, 241 A.D.2d 360, 663 N.Y.S.2d 812) and plaintiffs took an appeal as of right pursuant to

CPLR 5601(b)(1).[2]

IV. Analysis

This Court has long recognized the considerable authority of municipalities to implement zoning plans and programs to meet the increasing encroachments of urbanization on the quality of their residents' lives (see, e.g., Asian Americans for Equality v Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265; Matter of Harbison v City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42). Because they are legislative enactments, these land use regulations generally enjoy a strong presumption of constitutionality as valid exercises of the State's police power to advance the public health, safety and welfare (see, McMinn v Town of Oyster Bay, 66 N.Y.2d 544, 548-549, 498 N.Y.S.2d 128, 488 N.E.2d 1240; Udell v Haas, 21 N.Y.2d 463, 469-470, 288 N.Y.S.2d 888, 235 N.E.2d 897). Thus, even if the validity of a provision is "fairly debatable," the municipality's judgment as to its necessity must control (Matter of Town of Bedford v Village of Mt. Kisco, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 306 N.E.2d 155).

Municipal zoning authority is not, however, completely unfettered. Ordinances such as the one challenged here that aim to curb "adult" uses implicate speech or conduct that is protected by the First Amendment (see, e.g., Schad v Mount Ephraim, 452 U.S. 61, 65, 68 L. Ed. 2d 671, 101 S. Ct. 2176; Miller v California, 413 U.S. 15, 24, 37 L. Ed. 2d 419, 93 S.

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[2] Enforcement of the Amended Zoning Resolution was stayed pursuant to an Appellate Division order dated October 24, 1996 and a subsequent agreement among the parties. On September 23, 1997, this Court denied defendants' request for a vacatur of the stay (Stringfellow's of New York, Ltd. v. City of New York, 90 N.Y.2d 933, 664 N.Y.S.2d 266, 686 N.E.2d 1362).

Ct. 2607; Joseph Burstyn, Inc. v Wilson, 343 U.S. 495, 502-503, 96 L. Ed. 1098, 72 S. Ct. 777) and by Article I, 8 of the New York State Constitution.[3] Consequently, in weighing the validity of such zoning regulations, courts must consider the intertwined constitutional values of free expression.

In this State, the proper balance between community needs and free expression under our Constitution has been delineated in Matter of Town of Islip v Caviglia (73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215, supra). At issue in Islip was a zoning ordinance that confined adult uses to industrially zoned areas and prohibited them from locating within 500 feet of a number of certain sensitive receptors or within one-half mile of each other. The ordinance had been prompted by studies of conditions locally and elsewhere which demonstrated the harmful impact of adult businesses on the surrounding community. We concluded that the ordinance satisfied both federal constitutional standards (see, City of Renton v Playtime Theatres, Inc. (475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925) and the distinct protections afforded by our State Constitution. In so ruling, the Court considered whether the "predominant purpose" of the challenged ordinance was to ameliorate the negative secondary effects of adult uses rather than to suppress their content, whether the ordinance was "narrowly tailored to affect only those uses shown to produce the unwanted secondary effects" and whether it provided adequate alternative locations for adult businesses within the Town (73 N.Y.2d at 552-555, citing, City of Renton v Playtime Theatres, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925, supra; Young v American Mini Theatres, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440). With respect

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[3] Article I, § 8 provides in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

to the State constitutional claims in Islip, the Court considered whether the Town's ordinance was "justified by concerns unrelated to speech," whether it was "no broader than needed to achieve its purpose" under the State constitutional principles set forth in People ex rel. Arcara v Cloud Books (68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492) and, finally, whether "if the ordinance [were] enforced the total number of adult bookstores would decline or * * * fewer potential customers would be able to conveniently patronize them" (73 N.Y.2d at 557-560). It is against the template of Islip, that we measure plaintiffs' claims in these cases.

A. The Ordinance's Purpose Is Unrelated to Speech

The threshold issue here is whether the City's zoning Amendments are purposefully directed at controlling the content of the message conveyed through adult businesses or are instead aimed at an entirely separate societal goal. The federal constitutional analysis requires examination of the ordinance's "predominant purpose" (see, City of Renton v Playtime Theatres, supra), while the State constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech" (Town of Islip v Caviglia, supra, at 557). In the context of these facts, however, the difference in verbiage does not significantly affect the outcome, since it is apparent from the Amendments' legislative history that ameliorating the negative social consequences of proliferating adult uses was the City's only goal.

Before enacting the Resolution, the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City. One of these studies, prepared by the TSBID, focused on the impact of adult uses on property values and the incidence of crime in the Times Square area, in the heart of

Manhattan. The TSBID identified four study blocks (those containing at least one adult enterprise) and four neighboring control blocks (those with no sex-related establishments), and then compared those data with similar statistics for the District as a whole, the wider Times Square area, all of Manhattan, and all of New York City. The data included crime statistics, property valuations and 53 formal interviews with business and real estate enterprises.

The study concluded that "the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks along Ninth Avenue. To a lesser extent, the rate of increase of the actual total assessed value of the 42nd Street Study Block is less than that of the 42nd Street Control Block." It also determined that "within the study blocks, non-adult businesses with adult establishments nearby showed a deflated rate of property value growth, compared to the adult establishments themselves which increased in value at a higher rate." Similarly, the underlying data showed a correlation between a concentration of adult establishments and increased crime. Over the five years preceding the study, for example, police statistics showed that there was an estimated 54% decrease in crime in the Times Square area, a decrease which was paralleled by a decrease in adult establishments. The study also found significant "patterns," notably that there were many more criminal complaints on the study blocks than the control blocks and that the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult establishments.

The Chelsea Action Coalition and Manhattan Community Board 4 prepared a second study of the effects that sex-related businesses have on other businesses in the Chelsea section of Manhattan. The study incorporated a survey of 100 Chelsea businesses located near triple-X video stores and peep shows

in the neighborhood. A majority of those surveyed indicated that adult uses had a negative impact on their businesses and on the economic viability of the community as a whole.

The DCP independently surveyed six study and control areas--two in Manhattan, and one in each of the remaining boroughs. More than 80% of the real estate brokers responding to the survey reported that an adult establishment tends to depress the market value of property within 500 feet; similarly, community organizations overwhelmingly reported their perceptions that adult businesses negatively affect the community. Although the DCP acknowledged that its analysis of the hard data regarding the relationship between adult uses and urban ills did not yield conclusive results, a reading of its report as a whole indicates that the negative perception of adult enterprises held by the business community and the public itself results in disinvestment, with the concomitant deterioration in the social and economic well-being of the surrounding area.

Finally, the City additionally reviewed conclusions reached by city councils and town boards throughout the country. A 1984 study conducted for the City of Indianapolis, for example, found higher crime rates in areas containing at least one adult establishment than in similar areas without adult uses. The Indianapolis study included a nationwide survey of real estate appraisers. A large majority of the appraisers indicated that, in their professional opinions, an adult bookstore would have a negative effect on the value of both residential and commercial properties located within a one block radius of the store. Still another example was a 1997 Los Angeles study that included a survey of real estate professionals and businesses. The survey indicated that a concentration of adult establishments adversely affected the value of surrounding commercial and residential property, made it more difficult to rent office space and retain

commercial tenants in the area, and made it harder for area businesses to attract and retain customers.

In view of the legislative record upon which the City Council rested its decision to regulate adult uses, we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose (see, Town of Islip v Caviglia, supra). Plaintiffs' reliance on isolated comments from several City Council members and other City officials as evidence of an alleged improper motive to eradicate this form of expression is unavailing. A similar claim was rejected in Islip, where we recognized that courts will not "invalidate a municipal zoning ordinance simply because one or more legislators sought to suppress protected expression * * * . It is the motive of the Legislature, not individual legislators, that is controlling" (Islip, 73 N.Y.2d at 552 n.2).

Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (cf., Town of Islip v Caviglia, supra, at 557). The test under both Islip and Renton is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content (Islip, 73 N.Y.2d at 557; Renton, 475 U.S. at 44, 47-50; see also Young v American Mini Theatres, 427 U.S. at 52-54, 70-71 [plurality opinion]). That test is plainly met here.

Plaintiffs' complaints about the sufficiency of the evidence on which the City Council based its decision are unpersuasive. In Islip, we explicitly acknowledged the value of studies from other jurisdictions (73 N.Y.2d at 550, 553). Further, it is clear

from the comments of the CPC upon its approval of the Amendments that the appropriate municipal officials considered the comparability and the reliability of the other jurisdictions' studies and found them satisfactory on both counts. As the CPC noted, "while none of the other studies considers a municipality which duplicates New York City in terms of variety of neighborhoods and built conditions, * * * the findings of adverse secondary effects and the conditions found in these other studies are relevant to the different neighborhoods of New York City." Plaintiffs have not offered any factual or legal basis to question that finding.

Moreover, the City did not rely exclusively on generic conclusions drawn from out-of-area studies but also conducted studies of its own. Contrary to plaintiffs' contentions, the "non-empirical," anecdotal evidence that comprised the bulk of the local studies does not render those studies worthless. In the proper context, anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects (see, e.g., City of Renton v Playtime Theatres, Inc., 475 U.S. at 44, supra; ILQ Investments, Inc. v City of Rochester, 25 F.3d 1413, 1416-1417 [8th Cir], cert denied 513 U.S. 1017, 130 L. Ed. 2d 493, 115 S. Ct. 578), particularly where, as here, the non-empirical information is extensive and indicative of a clear relationship between adult uses and urban decay.

B. The Amendments Are No Broader Than Necessary

Based upon an extensive analysis of the impacts of such establishments in the City, the Amendment represents a coherent regulatory scheme designed to attack the problems associated with adult establishments. By preventing adult businesses from locating in potential residential districts while allowing such establishments to locate in manufacturing and commercial districts, the amendments protect only those

communities and community institutions that are most vulnerable to their adverse impacts.

It is now well recognized that municipalities can constitutionally bar adult establishments from, or within, a specified distance of residentially-zoned areas and facilities in which families and children congregate (see, City of Renton v Playtime Theatres, supra, at 44; Young v American Mini Theatres, supra, at 52; Town of Islip v Caviglia, supra, at 549, 563). Moreover, zoning ordinances may be used to prohibit an adult business from operating within a specified distance of another in order to avoid the undesirable impacts associated with the clustering (see, Young v American Mini-Theatres, supra, at 52; Town of Islip v Caviglia, supra, at 563).

Relying on our State constitutional standard (see, People ex rel. Arcara v Cloud Books, supra, at 558), plaintiffs insist that defendants should have pursued less restrictive methods of addressing the problems caused by adult uses, such as more aggressive enforcement of existing penal and public nuisance laws, developing targeted signage requirements and limiting adult-use zoning restrictions to new establishments. However, the record here shows that the City Council reasonably determined that the listed alternatives would not adequately address problems it sought to ameliorate.

According to its Report approving the proposed Amendments, the CPC concluded that restricting only new adult uses "would have the effect of freezing certain locations and certain neighborhoods as the situs of adult establishments," making the reversal of existing adult-use-related blight impossible. The CPC also looked at the possibility of sign regulations, but found, based on the studies before it, that such a narrow approach would not suffice to address such ills as reduced property values, economic stagnation, heightened

crime and change in neighborhood character. As to the efficacy of more aggressive law enforcement measures, the CPC hearings revealed that such measures are generally only partially successful in stemming the criminal activity that often surrounds adult establishments.

Contrary to plaintiff's assertions in Stringfellow's, the City was not obligated on this record to distinguish among different types of adult uses based on the social class of their clientele or the nature of the adult entertainment they provide. Indeed, such distinctions may well have themselves run afoul of constitutional prohibitions (see, Islip, 73 N.Y.2d at 558). Significantly, the CPC itself found that "all of the adult uses which would have been covered by the proposed regulations have been shown to produce adverse secondary effects * * * . Nothing in the studies or in the public testimony justifies distinctive treatment of any adult use." To the extent that certain individual establishments may legitimately claim that their facilities do not contribute to urban blight, their argument does not impair the constitutionality of the challenged legislation, since "the validity of a statute * * * is not to be determined from its effect in a particular case, but upon its general purpose and its effect to that end" (City of Rochester v Gutberlett, 211 N.Y. 309, 316, 105 N.E. 548; see also, ILQ Investments, Inc. v City of Rochester, 25 F.3d at 1418).

C. Reasonable Alternative Avenues of Communication

To satisfy constitutional requirements, the City additionally must assure reasonable alternative avenues of communication (see, City of Renton v Playtime Theatres, 475 U.S. at 53-54). As this Court stated in Islip, there must be (1) "ample space available for adult uses after the rezoning" and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the accessibility of those outlets to their

potential patrons (73 N.Y.2d at 555, 560).

Relying on a formula derived from City of Renton v Playtime Theatres (supra), the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways and roads" (475 U.S. at 53-54). Under Renton, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry (see, City of Renton v Playtime Theatres, supra, at 53; Woodall v City of El Paso, 49 F.3d 1120, 1124-1125, cert denied 516 U.S. 988, 116 S. Ct. 516, 133 L. Ed. 2d 425; Grand Brittain, Inc. v City of Amarillo, Tex., 27 F.3d 1068, 1070; see also, Town of Islip v Caviglia, supra, at 555, 560 [areas of a municipality set aside for adult uses need not be prime locations]). Rather, the inquiry is limited to the physical and legal availability of alternative sites within the municipality's borders and whether those sites are part of an actual business real estate market (see, Topanga Press, Inc. v City of Los Angeles, 989 F.2d 1524, 1530-1531, cert denied 511 U.S. 1030, 128 L. Ed. 2d 190, 114 S. Ct. 1537; see also, Woodall v City of El Paso, supra; Alexander v City of Minneapolis, 928 F.2d 278).

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (see, 989 F.2d at 1531). Notably, these considerations dovetail nicely

with Islip's requirement that there be "ample space available for adult uses after the rezoning" and no showing of a substantial reduction in the total number of adult outlets or the accessibility of those outlets to their potential patrons (73 N.Y.2d at 555, 560). With these considerations as a backdrop, we turn now to the specific facts and contentions presented here.

Plaintiffs assert, and the municipal defendants do not dispute, that the Amendments' enforcement will lead to the forced relocation of some 84% of the City's 177 adult businesses. Given the extent of the dislocation, it is incumbent upon the municipal defendants to demonstrate that sufficient alternative receptor sites are available. The City has asserted that the space available for adult uses constitutes over 11% of the City's total land area and about 4% when reduced by land encumbered by properties that are unlikely to be developed for commercial use. They further assert, based on maps prepared by City officials, that the amended zoning code leaves at least 500 potential sites for adult establishments to relocate and operate.

According to the City's submissions, the Amendment will allow adult businesses to remain in districts that permit a wide mix of commercial, retail, entertainment and manufacturing uses. All of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a subway line or a major bus route. These supported allegations by the City satisfy its initial burden of showing that the space designated for adult uses is adequate to accommodate the 177 existing adult businesses.

Plaintiffs, in challenging defendants' proof, rely heavily on an affidavit by Robert McLaughlin, a land-use planning and local government consultant who actually visited the sites the City identified as potential receptors. McLaughlin alleged that

many of the sites are in truth unavailable because they currently house long-term occupants such as governmental and public utility facilities that are unlikely to yield to new tenants of any sort. Other sites, according to McLaughlin, lack the necessary infrastructure or lie on wetland property that is not suitable for commercial development. Overall, McLaughlin concluded, the City's zoning plan does not allow for adequate alternative avenues for adult expression,

The McLaughlin affidavit, however, is not sufficient to raise a triable question of fact as to the availability of enough potential receptor sites. First, the affidavit's utility is undercut by McLaughlin's reliance on several assumptions that are inconsistent with controlling legal principles. McLaughlin, for example, took the position that "industrial areas" are generally unsuitable for generic commercial uses. In Islip, however, this Court specifically approved a local zoning ordinance that restricted adult uses to an industrial zone (73 N.Y.2d at 548, 555; accord, City of Renton v Playtime Theatres, supra, at 53). Similarly, McLaughlin eliminated undeveloped land, waterfront property, warehouse areas and parking lots as unsuitable receptors, although both this Court and the Renton Court expressly recognized such areas as potentially available relocation sites.

The most significant flaw in McLaughlin's affidavit, however, is the absence of any attempt to quantify his observations or to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by defendants were, in his estimate, unavailable. To be sure, the affidavit lists a significant number of sites that are pragmatically unavailable because their current uses are so entrenched that they are unlikely to become part of the commercial real estate market in the foreseeable future. Included in this category are such diverse sites as those that house the northern half of Federal Plaza in Manhattan, the

Clay Pit Ponds State Park Preserve in Staten Island, a New York City fire house in Brooklyn and a United Parcel Service facility in Queens. However, McLaughlin's criticisms about various individual sites do not provide an adequate counter to defendants' supported claim that within the available acreage as a whole there are more than enough receptor sites to accommodate the existing adult entertainment industry.

Even if the criticized sites are eliminated, the absence of any quantification in the McLaughlin affidavit makes it impossible to determine whether what remains of the 500 identified sites is insufficient to accommodate the 177 adult businesses that will have to relocate once the Amendments are implemented. For example, despite McLaughlin's observations that several tracts within the nonresidential zone along the far west side of Manahttan are physically or pragmatically unavailable, his affidavit does not contain the hard factual data necessary to establish that, with the elimination of these sites and with due consideration of the dispersal requirement, the City's claim that Manhattan will accommodate some 75 adult uses represents a significant overestimation. Given this shortfall, the accuracy of the City's overall calculations was not called into serious question. Similarly, the McLaughlin affidavit did not provide a basis for inferring that the result of the new zoning controls would "restrict in any significant way those wishing to [patronize adult establishments]" (Town of Islip v Caviglia, supra, at 554). Thus, the McLaughlin affidavit is speculative and presents no impediment to summary judgment (see, Romano v Stanley, 90 N.Y.2d 444, 452-452, 661 N.Y.S.2d 589, 684 N.E.2d 19).

D. Plaintiffs' Remaining Claims

The Amsterdam Video and Stringfellow's plaintiffs argue that the Amendments' enforcement will lead to an unconstitutional taking because much of the substantial investments they have

made in their businesses will be lost if they are required to relocate. They further contend that the one-year amortization provision in the ordinance (ZR §§ 52-734, 52-77) is too short to give them an opportunity to recoup their investments. These arguments are unpersuasive, however, because they fail to take into account the effect of the statutory provisions for hardship extensions. Under these provisions, a nonconforming adult establishment may apply to the Board of Standards and Appeals for permission to continue to operate beyond the one-year amortization period set forth in the statute where it can show that it has made substantial expenditures related to the nonconformity, that such expenditures cannot be recouped within a year and that the requested extension is the minimum necessary to permit such recoupment (ZR § 72-40). Having failed to seek relief under this provision, plaintiffs are not now in a position to complain that their constitutional due-process rights have been violated (see, Parkview Associates v. New York, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372 (1988), cert denied, 488 U.S. 801, 102 L. Ed. 2d 9, 109 S. Ct. 30; Town of Islip v Zalak, 165 A.D.2d 83, 95, 566 N.Y.S.2d 306).

Equally unavailing is plaintiff's contention that the Amendments are unconstitutionally vague. As a threshold matter, the Hickerson plaintiffs, purportedly patrons of adult establishments, lack standing to assert these claims because the Amendments do not directly regulate their conduct (see generally, Axelrod v Sobol, 78 N.Y.2d 112, 115, 571 N.Y.S.2d 902, 575 N.E.2d 388). With respect to the Amsterdam Video and Stringfellow's plaintiffs' vagueness claims, it should suffice to observe that the Amendments' definitional provisions are sufficiently specific to provide the public with clear and reasonable notice of the type of businesses that are covered. Indeed, the federal courts have already upheld similar zoning provisions that regulate commercial facilities devoting a "substantial portion" of their

businesses to adult entertainment (see, e.g., ILQ Investments, Inc. v City of Rochester, 25 F.3d 1413, cert denied, 513 U.S. 1017, 130 L. Ed. 2d 493, 115 S. Ct. 578 (1994)).

Finally, we are not persuaded by the Stringfellow's plaintiff's discrete argument that the ordinance's distance requirements are too vague because they do not include a statement indicating the precise standard for measurement. To the extent that this aspect of the ordinance's provisions leave room for confusion, the problem is procedurally remediable through administrative application and rule-making. Notably, there is no indication on the present record that the City's enforcement of the distance rules will be arbitrary or uneven.

V. Conclusion

The City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the standards set forth by the United States Supreme Court in City of Renton v Playtime Theatres (supra) or by this Court in Town of Islip v Caviglia (supra). Accordingly, in each case the order of the Appellate Division should be affirmed, with costs.

241 A.D.2d 360[1/]

STRINGFELLOW'S OF NEW YORK, LTD., Appellant,

v.

THE CITY OF NEW YORK, et al., Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Defendants-Respondents.

AMSTERDAM VIDEO INC., et al., Appellants,

v.

THE CITY OF NEW YORK, et al., Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Defendants-Respondents.

RACHEL HICKERSON, et al., Appellants,

v.

THE CITY OF NEW YORK, et al., Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT,

[1/] The caption in this case is exactly the same as those of the state court cases previously set forth in this appendix, with two exceptions: at the time this opinion was rendered, Joseph Miele was named as defendant Commissioner of Buildings, Department of Buildings of the City of New York; The Center for the Community Interest's corporate name was the American Alliance for Rights and Responsibilities.

CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Defendants-Respondents.

February 24, 1998

For Plaintiff-Appellant: Mark J. Alonso.

For Defendants-Respondents: Elizabeth S. Natrella.

For Intervenor-Defendant-Respondent: Frederick A. O. Schwarz, Jr.

For Intervenors-Defendants-Respondents: Wayne A. Cross.

For Amsterdam Video, Inc., et al., Plaintiffs-Appellants: Herald Price Fahringer.

For Rachel Hickerson, et al., Plaintiffs-Appellants: Beth Haroules.

July 10, 1997

The primary purpose of the challenged zoning amendment is to protect residential neighborhoods, as well as the facilities and commercial areas that serve them, from the purportedly negative effect attributable to the presence of an "adult establishment", i.e., a business that "regularly features" or devotes a "substantial portion" of its trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities". While a place of adult entertainment is, as a form of free expression, entitled to special protection, it "cannot claim an exemption from statutes of general operation aimed at preventing nuisances or hazards to the public health and safety", and "not every government regulation of general application, having

some impact on free expression, implicates constitutional guarantees" (People ex rel. Arcara v Cloud Books, 68 N.Y.2d 553, 558-559, 510 N.Y.S.2d 844). "A municipality may in the reasonable exercise of its police powers change its zoning to control land use and development" (Matter of Khan v Zoning Bd. of Appeals of Vill. of Irvington, 87 N.Y.2d 344, 350, 639 N.Y.S.2d 302, 662 N.E.2d 782), provided it does so in furtherance of a legitimate governmental purpose and there is a "'reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end'" (McMinn v Town of Oyster Bay, 66 N.Y.2d 544, 549, 498 N.Y.S.2d 128, 488 N.E.2d 1240, quoting French Investing Co. v City of New York, 39 N.Y.2d 587, 596, 385 N.Y.S.2d 5, 350 N.E.2d 381). An ordinance such as the one in issue meets that test (Matter of Town of Islip v Caviglia, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215, citing, inter alia, City of Renton v Playtime Theatres, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925).

We have considered plaintiffs' various arguments, including their attempts to distinguish Town of Islip (id.), and find them to be without merit.

171 Misc. 2d 376[1/]

STRINGFELLOW'S OF NEW YORK, LTD., Plaintiff,

v.

THE CITY OF NEW YORK, et al., Defendants,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Defendants.

AMSTERDAM VIDEO INC., et al., Plaintiffs,

v.

THE CITY OF NEW YORK, et al., Defendants,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT, CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Defendants.

RACHEL HICKERSON, et al., Plaintiffs,

v.

THE CITY OF NEW YORK, et al., Defendants,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT,

[1/] The caption in this case is exactly the same as those of the state court cases previously set forth in this appendix, with two exceptions: at the time this opinion was rendered, Joseph Miele was named as defendant Commissioner of Buildings, Department of Buildings of the City of New York; The Center for the Community Interest's corporate name was the American Alliance for Rights and Responsibilities.

CENTER FOR THE COMMUNITY INTEREST, et al., Intervenors-Defendants.

October 23, 1996

Mark J. Alonso, P. C., New York City, for Stringfellow's of New York, Ltd., plaintiff. Lipsitz, Green, Fahringer, Roll, Dalisbury & Cambria, L. L. P., New York City (Herald Price Fahringer and Erica T. Dubno of counsel), for Amsterdam Video Inc. and others, plaintiffs. New York Civil Liberties Union Foundation, New York City (Beth Haroules of counsel), for Rachel Hickerson and others, plaintiffs. Paul A. Crotty, Corporation Counsel of New York City (Albert Fredericks of counsel), for City of New York and others, defendants. Cravath, Swaine & Moore, New York City (Frederick A.O. Schwarz, Jr., and David A. Stoll of counsel), for Times Square Business Improvement District, intervenor-defendant. Dewey Ballantine, New York City (Wayne A. Cross, Heather K. McDevitt and Nancy Z. Shifren of counsel), for American Alliance for Rights and Responsibilities, intervenor-defendant.

Marylin G. Diamond, J.:

The issue raised by these three related actions is whether the City of New York in its attempt to disperse the present concentration of x-rated businesses in certain areas of the City has violated plaintiffs' rights of freedom of expression guaranteed under the New York State Constitution.

Plaintiff in Stringfellow's of N. Y. v City of New York (Stringfellow's) is an adult entertainment establishment that features topless female dancers. Plaintiffs in Hickerson v City of New York (Hickerson) are Manhattan and Bronx residents who allege they regularly patronize adult entertainment establishments located throughout the City of New York.

Plaintiffs in Amsterdam Video v City of New York (Amsterdam Video) are approximately 92 owners and operators of adult establishments. Plaintiffs, in these actions consolidated for the disposition of the underlying motions for summary judgment, seek to have this court declare unconstitutional the text amendment N 950384 ZRY to the Zoning Resolution of the City of New York (the Amended Zoning Resolution) on the ground that it unconstitutionally violates their freedom of expression guaranteed under this State's Constitution (NY Const, art I, § 8).

Prior Proceedings

The Amsterdam Video and Hickerson actions were removed from State court to the United States District Court for the Southern District of New York. The District Court then remanded that portion of the claims arising under the New York State Constitution, holding in abeyance the claims in both actions predicated on the Federal Constitution. The Stringfellow's action was commenced in State court.

Upon remand, this court granted Times Square Business Improvement District (TSBID) and the American Alliance for Rights and Responsibilities (AARR) motion to intervene as permissive intervenors. The Appellate Division, First Department, denied Amsterdam Video's, Hickerson's and Stringfellow's motions for a stay and an expedited appeal of that decision.

Background

As of 1965, nine adult entertainment establishments existed in the City of New York. By 1976, the number of such establishments increased to 151. Between 1976 and 1984, the number of adult entertainment establishments declined 13%, from 151 to 131 citywide. In Midtown Manhattan alone, the

number of adult uses declined by 48, from 97 to 49. The over-all decline was offset by an increase of 28 adult establishments, from 30 to 58 establishments, in the City's other four boroughs. Between 1984 and 1993, there was a 35% increase to 177; 107 in Manhattan, 44 in Queens, 15 in Brooklyn, 8 in the Bronx, and 3 in Staten Island.

In response to community concerns regarding the increase in adult establishments and their allegedly adverse impacts upon those communities, the New York City Department of City Planning (DCP) undertook a study in late 1993 (the DCP Study) to determine the nature and extent of the impact that adult establishments have on communities and to assist the New York City Planning Commission (the Planning Commission) in determining whether to amend the City's Zoning Resolution so as to specifically regulate adult entertainment establishments.

As part of its study, DCP selected seven areas where adult uses are located: Manhattan Community Districts 4, 5, and 7; Bronx Community District 5; Brooklyn Community District 7; Queens Community District 2; and Staten Island Community District 2. DCP did not study the Times Square area because that area was already under study by TSBID (the TSBID Study). DCP also surveyed representatives from community boards, local organizations and businesses, the adult entertainment industry, as well as real estate brokers, and police and sanitation officers in order to compile information concerning the impact of adult entertainment establishments on land use, street conditions, property values, and crime. In addition, the DCP Study considered local studies and surveys such as the Chelsea Business Survey and the TSBID Study. The DCP Study also included a survey and review of adult entertainment studies conducted by other cities such as Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee

County, Florida; New Hanover County, North Carolina; and the State of Minnesota. Also considered were the impacts identified by the City Planning Commission's 1977 Report, the 1983 Annual Report of the Mayor's Office of Midtown Enforcement, and the 1993 Task Force on the Regulation of Sex-Related Businesses.

The DCP Study concluded that the number of adult uses citywide has increased substantially in recent years, that a majority of the adult entertainment establishments are located in zoning districts that permit residential developments, and that such establishments as they proliferate tend to concentrate in certain neighborhoods. For example, in Manhattan, adult establishments have clustered in central locations such as Times Square. In the outer boroughs, these establishments have concentrated along major arteries, such as Queens Boulevard in Queens and Third Avenue in Brooklyn. The DCP concluded that the presence of adult entertainment establishments, particularly those that are concentrated in a specific area, tends to produce negative secondary effects such as increased crime, decreased property values, and reduced shopping and commercial activities. Accordingly, the DCP recommended to the Planning Commission that the Zoning Resolution be amended so as to regulate adult entertainment establishments more closely than other commercial uses by placing restrictions on the proximity of adult uses to residential areas, schools, houses of worship, and other adult establishments. Prior to this recommendation, the City's Zoning Resolution had made no distinction between adult entertainment establishments and other commercial activities.

Pending enactment of amendments to the Zoning Resolution, the Planning Commission approved and the New York City Council adopted an interim amendment to the Zoning Resolution which imposed a one-year moratorium on

new or expanded adult entertainment establishments. During the moratorium, no new adult entertainment establishments were allowed and no existing establishment could be enlarged or extended for a period of one year from its effective date of November 24, 1994. The moratorium applied to stores featuring adult books, magazines, videotapes, topless or nude bars and adult theaters featuring films, videotapes, or live sex shows.

On March 21, 1995, the DCP and the New York City Council Land Use Committee filed a joint application to amend the Zoning Resolution by proposing permanent regulations that would place restrictions on the location, size and signage of specified types of adult establishments. The objective of the proposed amendments to the Zoning Resolution would be to break the concentration of adult entertainment establishments in certain neighborhoods by dispersing such businesses to certain permissible zoned districts. Following extended public hearings, comments and recommendations on the proposed regulations, the City Council approved the Amended Zoning Resolution on October 25, 1995, effective on that date.

The Amended Zoning Resolution

The centerpiece of the Amended Zoning Resolution is a set of locational restrictions and anticoncentration provisions that are designed to shield the City's residential neighborhoods, and the facilities and commercial areas that serve them, from the negative impacts produced by adult uses. Even before the regulations were adopted, the general regulatory scheme embodied in the Zoning Resolution prohibited new commercial development in the City's residentially zoned districts. Under the Amended Zoning Resolution, adult uses are also barred from certain districts that are zoned for commercial and manufacturing uses, but, in addition, permit new residential

development (Amended Zoning Resolution § 32-01 [a]; § 42-01 [a]). Many of these districts are mapped within residential districts and contain the local retail strips that serve the everyday commercial needs of the surrounding residential neighborhoods. Adult uses continue to be allowed, subject to certain restrictions, in a number of commercial and manufacturing districts that are mapped throughout the City and in which a variety of retail, entertainment and other commercial uses are permissible (Amended Zoning Resolution § 32-01 [b]; § 42-01 [b]).

In the districts in which adult establishments are permitted, certain restrictions are imposed to further ensure that such uses do not adversely impact residential communities or the facilities that serve them. In these districts, adult establishments must be located at least 500 feet from any school, day care center, or house of worship and at least 500 feet from most zoning districts in which new residential uses are allowed (Amended Zoning Resolution § 32-01 [a]; § 42-01 [b]).

The Amended Zoning Resolution also contains several provisions designed to prevent the concentration of adult uses. In the districts in which adult entertainment are permitted, a new adult use must be located at least 500 feet from any other adult use (Amended Zoning Resolution § 32-01 [c]; § 42-01 [c]). Moreover, only one adult establishment, not to exceed 10,000 square feet of usable floor area, may be located on a zoning lot (Amended Zoning Resolution § 32-01 [d], [e]; § 42-01 [d], [e]). The Amended Zoning Resolution also regulates the size, placement and illumination of accessory business signs on adult establishments, but not their content (Amended Zoning Resolution § 32-69, 42-55).

The Amended Zoning Resolution subjects existing adult establishments that do not conform to the restrictions contained

therein to the amortization provisions which require them to come into conformity or terminate within one year of the amendment's effective date of October 25, 1995 (Amended Zoning Resolution § 52-734, 52-77). The Amended Zoning Resolution further provides that upon application of the owner of a nonconforming adult establishment the Board of Standards and Appeals may allow a nonconforming establishment to be maintained for more than one year from the effective date of the regulations. In order to grant such an extension, the Board must find that the applicant has made substantial expenditures related to the nonconformity, which the applicant has been unable to recover by the prescribed one-year deadline, and that the extension is the minimum necessary to enable the applicant to recover those expenditures (Amended Zoning Resolution § 72-40).

The Amended Zoning Resolution provides for a limited exemption for adult establishments existing as of October 25, 1995 (Amended Zoning Resolution § 32-01 [f]; § 42-01 [f]). These establishments that are not located in the prohibited districts and are otherwise conforming except that they are within 500 feet of another adult use, located on the same zoning lot of another adult use, or exceed 10,000 square feet of usable floor area, would not be subject to the amortization provisions of section 52-77.

Discussion

Analysis begins with a review of two separate and competing principles implicated in these actions: freedom of expression and governmental zoning powers. Article I, § 8 of the New York State Constitution provides in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." This State's highest Court

has ruled that New York's constitutional guarantee of freedom of expression affords greater protection than its Federal counterpart (People ex rel. Arcara v Cloud Books, 68 NY2d 553, 557 [1986]). In so ruling, the Court of Appeals emphasized that "New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community" (supra).

With regard to zoning, the Court of Appeals has recognized that municipalities have broad powers to implement land use controls to meet the increasing encroachments of urbanization on the quality of life (Matter of Town of Islip v Caviglia, 73 NY2d 544, 550 [1989]; Asian Ams. for Equality v Koch, 72 NY2d 121, 128-129 [1988]; Matter of Harbison v City of Buffalo, 4 NY2d 553, 559 [1958]). Restrictions on real property use and development are justified as a proper exercise of a municipality's police power to advance the public health, safety and welfare (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 550, citing Berman v Parker, 348 US 26, 32 [1954], and Udell v Haas, 21 NY2d 463, 469-470 [1968]).

Preventing neighborhood deterioration is undeniably a legitimate public objective. (See, Berman v Parker, 348 US, supra, at 32-33.) Without stable residential and commercial neighborhoods large sections of a modern city can quickly deteriorate into an urban jungle with tragic consequences to social, environmental and economic values (Young v American Mini Theatres, 427 US 50, 80 [1976] [Powell, J., concurring]). Zoning when used to preserve the character of specific areas of a city is " 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' " (Supra.)

Zoning ordinances are legislative acts that enjoy a strong

presumption of constitutionality and if there is a reasonable relation between the end sought to be achieved and the means adopted to achieve that end the regulation will be upheld (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 550-551, citing Asian Ams. for Equality v Koch, 72 NY2d, supra, at 132; McMinn v Town of Oyster Bay, 66 NY2d 544, 549 [1985], and Shepard v Village of Skaneateles, 300 NY 115, 118 [1949]). Where the issue is "fairly debatable" courts must defer to the legislative judgment on the need for such regulation (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 551).

An unavoidable constitutional tension is created, however, when a municipality's zoning power is used to regulate lawfully operating establishments that are devoted to adult uses protected under this State's constitutional guarantee of freedom of expression (see, Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 551). It is against this framework that this court must determine whether the Amended Zoning Resolution violates plaintiffs' freedom of expression.

The parties agree that the Court of Appeals decision in Islip (supra) is dispositive of the constitutional issues raised herein. They differ on its application to the instant case. In Islip, the Town of Islip sought to enjoin the continued operation of an adult bookstore in a restricted zone on the grounds that its operation was in violation of the Town's restrictive zoning ordinance applicable to adult uses. On appeal to the Court of Appeals, the restrictive zoning ordinance was found to be content-neutral because it was enacted to prevent the deterioration of neighborhoods, and, as such, was upheld as a valid exercise of governmental police power.

The test as articulated by the Islip Court to determine whether a zoning ordinance, such as the Amended Zoning Resolution, is constitutional under the State's Constitution is

as follows: (1) the ordinance must be justified by concerns unrelated to speech; and (2) it must be "no broader than necessary" to achieve its purpose (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 558-559, citing People ex rel. Arcara v Cloud Books, 68 NY2d 553, supra). Although the first prong of this two-prong test is not labeled as such, it is essentially the same type of inquiry as the "predominant purpose/secondary effects" test enunciated by the United States Supreme Court in Renton v Playtime Theatres (475 US 41 [1986]) in analyzing restrictive zoning regulations in the context of the First Amendment (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 551, 557-558). In his dissent, Associate Judge Titone observed, without comment from the majority, that the majority's "reliance on the purpose of Islip's ordinance is remarkably similar to the 'predominant purpose' test espoused in Renton v Playtime Theatres", and reasoned that "[a]lthough the majority does not explicitly adopt or apply the 'predominant purpose' test, in the absence of some other clearly articulated principle, the majority opinion must be read as an incorporation of the 'predominant purpose' test into the framework of our State's freedom of speech jurisprudence" (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 570 [Titone, J., dissenting]). The Islip Court also recognized that Renton requires as another component of the two-prong test that a restrictive zoning ordinance, such as the Amended Zoning Resolution, provide alternative locations for adult use businesses (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 554-555).

In challenging the constitutionality of the Amended Zoning Resolution, plaintiffs contend that since its language bans the distribution or exhibition of nonobscene adult entertainment, a form of protected speech, in designated areas of the City, it is a content-based regulation that purposefully regulates speech. As such, plaintiffs contend that the Amended Zoning Resolution is presumptively invalid. The City, TSBID and

AARR argue that the Amended Zoning Resolution is not content-based, but content-neutral under Islip (supra) and Renton (supra).

Whether the Amended Zoning Resolution is content-based or content-neutral is of no import. The compelling State interest analysis applicable to content-based regulations involves the same inquiry needed in determining whether the Amended Zoning Resolution is content-neutral; that is whether it was justified by concerns based on adverse secondary effects, rather than speech. In fact, in analyzing Islip's zoning ordinance as a content-based regulation, Associate Judge Titone noted in his dissent, without comment from the majority, that "[w]hile there can be no doubt that a municipality has an interest in 'the stability and revitalization of the neighborhoods' ... this interest cannot be considered 'compelling' without at least some showing that the form of expression to be regulated has an actual and specific deleterious effect on the community" (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 567). The critical question then becomes whether the enactment of the Amended Zoning Resolution was a purposeful attempt to regulate speech or an attempt to address the alleged adverse secondary effects caused by the proliferation of adult establishments.

Plaintiffs contend that the Amended Zoning Resolution is constitutionally infirm because the City has failed to demonstrate the existence of adverse secondary effects. They criticize the City's reliance on other studies conducted nationwide and locally. Specifically, they argue that the DCP Study and other studies on adverse secondary effects considered by the Planning Commission and the testimonial evidence during the public hearings held before the City Council are unreliable since they were not based on empirical or documented data, but rather anecdotal and inconclusive evidence. The Amsterdam Video and Hickerson plaintiffs

point to the report prepared by their expert, R. Bruce McLaughlin (McLaughlin), a land-use planning and local government consultant based in Florida, for support. McLaughlin concludes, even though he did not perform his own independent study, that he does not believe that any existing study has demonstrated that adverse secondary effects have resulted from the presence of adult establishments. He also disagrees with zoning studies used in Indianapolis, Los Angeles, Phoenix and Austin among others. Most telling is his attack upon the Islip Study, about which he says: "In my professional opinion, based on the reviews and analyses described above, and on my professional training and experience, there is nothing in the Islip Study that documents the alleged adverse secondary effects of Adult Uses in general, supports the 'legislative findings' of the Ordinance, or provides information upon which a reasonable and prudent planner or local government official could reasonably believe or rely upon in the regulation of adult entertainment establishments." (McLaughlin affidavit P 171.) This is the very same study which the New York Court of Appeals characterized as follows: "The ordinance was prepared after thorough study of the community by professional planners and municipal officials. The Report on which it was based recognized the competing concerns in its first paragraph when it stated that: 'This report studies the effects of adult entertainment or sex businesses on surrounding uses, both residential and commercial. ... Materials or entertainment opportunities offered at these businesses are not a concern of this report.' The research and data underlying the Report supported its conclusion that the presence of such uses had a deleterious effect on the quality of life in the communities of the Town and the ordinance which followed was adopted in conjunction with a comprehensive plan for the development of the Town as a whole" (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 552).

In Renton (supra), the United States Supreme Court held that a municipality is entitled to rely on the experiences of other cities concerning adverse secondary impacts in enacting a zoning ordinance regulating adult use businesses (Renton v Playtime Theatres, 475 US, supra, at 51). The Supreme Court further held that: "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses" (supra, at 51-52 [emphasis added]). In recognizing the legitimacy of this analysis, our Court of Appeals observed that "planning studies, by their nature, are not scientific nor their predictions certain but [a municipality is] entitled to credit the evidence in its study of past deterioration and the prediction that, unless remedied, the deterioration would continue; it [is] not required to wait before acting until its business areas [become] wastelands" (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 553-554). The Court of Appeals also recognized that "planning studies have established that adult bookstores and other adult entertainment facilities are generally injurious to the maintenance and development of healthy commercial and residential areas" (supra at 551). Thus, the City's methodology in determining whether adult establishments existing in the City produced negative impacts was constitutionally permissible. Nor was the City, as plaintiffs, particularly Stringfellow's (supra), contend, required by Islip or Renton to conduct an independent assessment of every adult establishment to determine whether these particular places caused any adverse secondary impacts. All that is constitutionally required is that there is a reasonable belief that adult entertainment businesses, including the upscale kind allegedly offered by Stringfellow's, produce at least some of the unwanted secondary effects so as to permit the City to experiment with solutions to admittedly serious problems (ILQ Invs. v City of Rochester, 25 F3d 1413, 1418 [8th Cir

1994], cert denied 513 US 1017, citing and quoting Young v American Mini Theatres, 427 US 50, supra).

Based on the foregoing, the City was permitted to rely on the DCP Study, as well as other studies, to determine whether adult use businesses produce adverse secondary effects.

The DCP Study was undertaken in response to growing concerns that adult establishments were proliferating in New York City and concentrating in areas where such establishments had previously not located, causing negative effects on surrounding communities. DCP also considered the study prepared by the TSBID concerning the location and concentration of adult use businesses in the Times Square area which concluded that some adult establishments could exist in the Times Square area, but their growing number and their concentration on Eighth Avenue constitute a threat to commercial prosperity and residential stability.

Also considered was the Chelsea Business Survey which showed that a large majority of the commercial tenants in the area reported a negative impact on the economic vitality of their businesses stemming from the proximity of adult use businesses. An even larger percentage of those surveyed held the belief that the concentration of adult establishments has resulted in a declining potential for doing business in Chelsea. The DCP also considered studies prepared by other States. Those studies essentially concluded that adult entertainment establishments have negative secondary impacts such as increased crime rates, depreciation of property values and deterioration of community character and the over-all quality of urban life. Although there was testimony in opposition to the amendments to the zoning resolution, the great preponderance of such opposition was that the proposals were not restrictive enough and that adult uses should be prohibited in more areas of the City.

The voluminous and comprehensive administrative record clearly demonstrates the City not only reviewed studies from other jurisdictions, but actually used those studies to guide it in its study to determine the existence of negative secondary effects associated with adult use businesses, and in formulating a proper response to combat such effects. Based on this record the City Council was justified in finding that the present configuration of adult use establishments causes adverse secondary effects, a finding which demonstrates that the Amended Zoning Resolution was based on a compelling State interest related to combating such negative effects, rather than restricting speech. As such, the finding is entitled to deference by this court (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 550-551). It is noteworthy that there are similar characteristics in the City's Amended Zoning Resolution with other cities' zoning ordinances regulating adult uses, and significantly that some of those ordinances are more restrictive than the Amended Zoning Resolution (see, e.g., Detroit, Michigan [1,000-foot buffer zone]; Islip, New York [permissible in industrial zone only]; Renton, Washington [1,000-foot buffer zone]; Seattle, Washington [confined to commercial areas]).

Plaintiffs contend that the Amended Zoning Resolution is broader than necessary, and, as such, is unconstitutional. This contention is unavailing. The Islip Court has held that a municipality may utilize its zoning powers to address the negative effects associated with adult use businesses given the fact that such effects are not subject to direct attack (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 559). The Court deemed this approach as the "most appropriate" response to addressing the existing problems. Under these circumstances, the Amended Zoning Resolution is no broader than necessary,

and does not violate the State Constitution.[1]

The last requirement that the Amended Zoning Resolution

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[1] Contrary to plaintiffs' assertion, the Amended Zoning Resolution is not unconstitutionally vague. In deciding whether an ordinance, such as the Amended Zoning Resolution, is vague, this court must consider whether the Amended Zoning Resolution is sufficiently definite so as to provide a person of ordinary intelligence with fair notice that his conduct is forbidden by the resolution (Town of Islip v Caviglia, 141 AD2d 148, 163 [2d Dept 1988], affd 73 NY2d 544, supra). Here, the core language of the Amended Zoning Resolution is sufficiently specific, detailed, and definite leaving no doubt as to whether a business falls within the definition of an adult establishment. Where a party's actions are clearly within the reach of the Amended Zoning Resolution, this court will not "strain to imagine hypothetical situations where the application of a statute or ordinance would be unclear" (Town of Islip v Caviglia, 141 AD2d, supra, at 163).

Next, the Amended Zoning Resolution must set forth explicit standards for those who apply them to preclude arbitrary and discriminatory resolution (Town of Islip v Caviglia, 141 AD2d, supra, at 163). In that regard, the City must be allowed a reasonable opportunity to develop guidelines and standards in its enforcement efforts so as to narrowly tailor the Amended Zoning Resolution to affect only the category of uses that produce the unwanted negative effects (see, Young v American Mini Theatres, 427 US, supra, at 71). If a business is deemed an adult entertainment establishment within the meaning of the Amended Zoning Resolution, appropriate administrative and judicial redress may be pursued challenging the rationality of such designation.

must meet to pass constitutional muster is whether it allows for "reasonable alternative avenues of communication" (Renton v Playtime Theatres, 475 US, supra, at 50). The New York standard enunciated by the Islip Court is virtually identical--whether or not "there remains ample space available for adult uses" (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 555).

In support of its contention that "there remains ample space available for adult uses", the City submitted affidavits by Joseph B. Rose, Chairman of the New York City Planning Commission and Director of the DCP, William Bernstein, the First Deputy Executive Director of the DCP, and Andrew S. Lynn, Executive Director of the DCP.

The record establishes that the Amended Zoning Resolution permits adult establishments in a number of commercial and manufacturing districts and in all of the City's five boroughs. The total available land area in which adult establishments are permitted is almost 4% of the City's total land area. Adult establishments are allowed in districts which are also zoned to permit retail, recreational, entertainment and commercial uses.

Bernstein claims in his affidavit that the Amended Zoning Resolution does not unduly restrict adult uses to "limited or unsuitable" areas of the City (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 559). To refute plaintiffs' claim that Amended Zoning Resolution is unduly restrictive, Bernstein analyzes five paradigm areas, one from each borough, where adult establishments presently exist and which will permit adult establishments under the Amended Zoning Resolution.

Bernstein's analysis of the impact of the Amended Zoning Resolution on Manhattan is especially compelling. Bernstein

examines the six Manhattan community districts below 59th Street which presently contain 100 adult establishments, the majority of the City's adult businesses. In the area below 59th Street, undisputably a world-class business, retailing and entertainment center, it is calculated that 19 existing adult establishments may remain and that there are approximately 78 potential sites for relocation in this area. Under the new regulations, adult uses are permitted between 26th and 55th Streets from Fifth Avenue to Eighth Avenue, although it is acknowledged that few adult uses will be permitted between 34th and 49th Streets because there are a large number of schools and houses of worship located there which require 500-foot separation zones. However, the area between 49th and 55th Streets is a major tourist area containing a large number of hotels and theaters and the area between 26th and 33rd Streets abuts Herald Square, a major retail center. Adult uses are also permitted on the far west side of Manhattan between 12th and 57th Streets. The southern portion of this area is adjacent to Greenwich Village and the Chelsea area. This area contains the Jacob K. Javits Convention Center, tourist attractions such as the Intrepid Air and Space Museum, and the Circle Line Terminal, as well as other retail and commercial establishments, transportation facilities, parking lots, health clubs, restaurants, art galleries, studios, warehouses, trucking facilities, automobile showrooms, and film production facilities. The Chelsea Piers Sports and Entertainment Complex, a large and expensive entertainment facility, recently opened in this area. Adult uses are also permitted on several block fronts on Eighth Avenue just south of Times Square, in southwest Greenwich Village between Clarkson and Spring Streets along Greenwich and Hudson Streets as well as several small areas of lower Manhattan. This specific analysis belies plaintiffs' bald allegation that Manhattan-oriented patrons of adult establishments will be required to travel to the outer boroughs.

The Bernstein affidavit also details the proximity to transportation which characterizes the five paradigm areas. It reveals that all of the Manhattan permissible districts and 80% of the permissible districts in the outer boroughs are within a 10-minute walk from mass transportation such as subways or buses. The permissible districts are also adjacent to or relatively near major roadways. Many, such as the west side of Manhattan, are convenient to bridge and tunnel crossings. The Staten Island paradigm district is linked by bus to the Staten Island Ferry.

Another significant factor considered by the City is the availability of relocation sites for existing adult establishments required to relocate under the Amended Zoning Resolution. During the enactment process, the City calculated that a total of approximately 500 adult establishments will be able to operate in the new adult zones. The DCP calculation was done by factoring in the 500-foot separation provisions in the Amended Zoning Resolution and by excluding certain properties unlikely to be developed for commercial use such as airports, properties occupied by public utilities, oil storage facilities, large tracts of publicly owned property and wetlands. The City argues that 500 potential sites should more than adequately cover the 147 businesses which must relocate.

The City also points out that very few currently operating adult establishments are as large as the 10,000 square foot useable floor area size permitted under the Amended Zoning Resolution. They also point out that the amendments do not restrict establishments which sell or display limited amounts of adult material often found at general purpose book and video stores and newsstands. They also argue that the amendments permit all the existing adult establishments to continue to operate and also permit an expansion in terms of numbers and size of establishments.

Plaintiffs argue that the amendments relegate adult establishments to remote and inaccessible areas of the City and that, after excluding sites which are not part of the relevant real estate or commercial marketplace, there is not an adequate number of potential relocation sites for those adult establishments required to relocate under the Amended Zoning Resolution. In support of their arguments plaintiffs principally rely upon McLaughlin's affidavit.

McLaughlin concludes that "the number of sites truly available is inadequate to accommodate the adult uses required to relocate under the Amended Zoning Resolution". (McLaughlin affidavit P 49.) He arrives at his conclusion by the same methodology (a process of elimination of sites based upon factors which he claims makes certain sites unavailable) which was adopted by the United States Court of Appeals for the Ninth Circuit in Playtime Theatres v City of Renton (748 F2d 527, 534 [9th Cir 1984]) and specifically rejected by the Supreme Court in its reversal of that decision.

"Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of '[a]mple, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.' ...

"Respondents argue, however, that some of the land in question is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable'

adult theater sites within the 520 acres left open by the Renton ordinance ... The Court of Appeals accepted these arguments, concluded that the 520 acres was not truly 'available' land, and therefore held that the Renton ordinance 'would result in a substantial restriction' on speech ...

"We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' ... we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices ... In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement" (Renton v Playtime Theatres, 475 US, supra, at 53-54).

Based on the foregoing, McLaughlin's methodology is fatally flawed inasmuch as his analysis depends on factors which he claims must exist for it to be suitable for "some generic commercial enterprise". Included in these factors are criteria which courts have consistently rejected. For example, McLaughlin cites the use of industrial areas as one factor in his analysis despite the fact that the Islip zoning resolution limited the establishment of adult uses exclusively to an industrially zoned district (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 555; see also, County of Cook v Renaissance Arcade & Bookstore, 122 Ill 2d 123, 522 NE2d 73, 79 [1988], appeal dismissed sub nom. Mannheim Books v

County of Cook, 488 US 882 [1988]). His process of elimination also uses such factors as whether the property is unavailable because it is presently occupied by a long-term lessee, whether it is banned for adult use because of a clause in a master lease, and whether the owners refuse to rent to adult establishments, despite rejection of these very arguments by the Renton Court (see also, O'Malley v City of Syracuse, 813 F Supp 133, 147 [ND NY 1993] [areas designated for adult use may include sites currently occupied by other businesses]; City of Natl. City v Wiener, 3 Cal 4th 832, 12 Cal Rptr 2d 701, 711-712 [1992], cert denied 510 US 824 [1993] [local governments are not responsible for the business decisions of private individuals]). McLaughlin also claims that whether or not there are police patrols in the area equal to that of other commercial areas is a factor to be considered despite the lack of any authority for such criterion.

Other categories of land eliminated by McLaughlin are undeveloped land, waterfront property and parking lots. This arbitrary exclusion, rejected by the Renton Court, makes absolutely no sense since New York has a consistent history of commercial development of undeveloped land, parking lots and waterfront property (see, Schneider v City of Ramsey, 800 F Supp 815, 823 [Minn 1992] [adult use districts may include undeveloped sites], affd sub nom. Holmberg v City of Ramsey, 12 F3d 140 [8th Cir 1993], cert denied 513 US 810). Indeed, most of McLaughlin's criticisms are at odds with controlling case law.

Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP, he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.

Plaintiffs' challenge of the DCP calculation that the Amended Zoning Resolution will permit the operation of 500 adult establishments is also based upon the deposition testimony of Marilyn Mammano, DCP's Director of Zoning and Urban Design, who was produced for deposition pursuant to court order. Although plaintiffs characterize the Mammano deposition as proof that the DCP analysis is nothing more than a computerized claim and that no one from the City has inspected any of the claimed alternative sites, review of the transcript and reference to the record reveals otherwise. Mammano testified that she supervised the staff members who prepared the calculation which was based on maps prepared by the DCP. The maps showed the permissible areas and "sensitive receptors" such as schools and churches as well as properties unlikely for commercial development. Using the maps, and excluding encumbered areas and the sensitive receptors, and allowing for the appropriate 500-foot separation zone, DCP staff members used a measuring device to estimate a citywide total of 500 potential sites for adult establishments. Mammano stated her measurements were conservative and that they were accurate to within plus or minus 10%. The maps were made from tax assessment data and measured the 500-foot separation conservatively from the lot line rather than the facility on the lot. Although plaintiffs challenge this analysis because DCP failed to identify specific available sites, Mammano's testimony established that the City's calculation was not site specific, but an estimate of the number of potential sites in the permissible areas under the Amended Zoning Resolution. The record also established that DCP staff members, many assigned to borough offices, were familiar with and had visited the areas of the permissible zones through their work at DCP and that Mammano herself was familiar with certain boroughs. Although counsel for the New York Civil Liberties Union represented at the Mammano deposition that she had engaged an expert to verify the City's method of and procedure for their calculations, the record does not

contain any such expert affidavit.

Moreover, there is not a scintilla of evidence in the record to show that any of the affected owners have made any attempt to find or negotiate for alternative sites. One would expect that during the 10 months since the passage of the Amended Zoning Resolution affected owners would investigate specific sites or engage commercial real estate brokers to assist them in locating such sites. Despite the plethora of generalized and conclusory allegations made by plaintiffs, the record is utterly devoid of a single action taken by a single affected owner or operator of an adult establishment to negotiate for alternative space. Nor is there any submission from any local commercial real estate broker familiar with the local commercial real estate market verifying the alleged lack of availability.

Plaintiffs' challenge is based purely upon speculation and analyses based on criteria rejected by Renton (supra). By contrast the City has demonstrated an awareness of its constitutional obligation to make adequate provisions for adult establishments while simultaneously dealing with the secondary effects created by them. A party opposing summary judgment must come forward with evidentiary proof. Merely alleging that the opposing party's evidence in support of the motion is inaccurate, incredible or in dispute will not suffice (Bachrach v Farbenfabriken Bayer AG., 36 NY2d 696 [1975]; Downey v General Foods Corp., 31 NY2d 56, 62 [1972]). Moreover, plaintiffs' claim that additional discovery is needed so as to defeat the City's motions for summary judgment is unavailing in view of the present administrative record that this court finds to be thorough, extensive and comprehensive (Frierson v Concourse Plaza Assocs., 189 AD2d 609, 610 [1st Dept 1993]; see, Reilly & Co. v Rockefeller Ctr. Mgt. Corp., 223 AD2d 477 [1st Dept 1996]).

The cases relied upon by plaintiffs, Topanga Press v City of Los Angeles (989 F2d 1524 [9th Cir 1993], cert denied 511 US 1030 [1994]) and Islip (supra), do not suggest otherwise. Rather, they reiterate that the key is whether the challenged Amended Zoning Resolution allows for the operation of at least as many adult establishments as existed before enactment. In Topanga, the principal case relied upon by plaintiffs, the Ninth Circuit affirmed the issuance of a preliminary injunction against the challenged adult use zoning regulation which restricted adult use establishments to certain areas with a 1,000-foot separation requirement between adult uses. The real estate expert employed by those challenging the zoning regulations concluded that there were 120 potentially viable relocation sites. Since more than 102 adult businesses in Los Angeles would need to relocate, the Ninth Circuit found that, when allowance was made for a margin of error, there was a substantial risk that the zoning resolution would reduce the number of reasonable sites potentially available thereby resulting in a decline in the total number of adult establishments. This result supported the granting of a preliminary injunction. In Topanga, there was a nearly one-to-one ratio of available sites to relocating businesses. In this case, the ratio of available sites to relocating businesses is greater than three to one.

In Islip (supra), since the stipulated facts demonstrated that ample space was available for relocation there was ostensibly no need for our Court of Appeals to address the issue. Nonetheless, the Court indicated that had there been a claim that "if the ordinance is enforced the total number of adult bookstores will decline or that fewer potential customers will be able to conveniently patronize them", it would be otherwise (Matter of Town of Islip v Caviglia, 73 NY2d, supra, at 560). On this record, no such threat exists. Even if the City's estimate overstates the number of potentially viable relocation sites, there still remains ample space for more than the existing

numbers of adult establishments.

Finally nothing in Renton (supra), Islip (supra) or any existing case law requires the City to identify specific sites that are actually available. Indeed, all that is required is that plaintiffs are afforded a reasonable opportunity to relocate (Renton v Playtime Theatres, 475 US, supra, at 54). Defendants have more than sufficiently demonstrated that the permissible areas are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. While plaintiffs have labored mightily to create issues of fact, none exist.

Neither the Federal nor New York State Constitution mandates that the City guarantee the existence of specific, economically feasible, readily available sites owned by persons willing and able to rent to adult establishments with available door-to-door public transportation for those persons seeking to patronize them. Moreover, the Amended Zoning Resolution carefully balances the interests of those who seek to eliminate the neighborhood blight caused by an overconcentration of adult establishments against an individual's constitutional right to patronize adult establishments.

New York's long history and tradition of fostering freedom of expression and tolerating ideas that some may find offensive is in no danger from the Amended Zoning Resolution for the City has silenced no message. Those seeking to patronize adult establishments will be able to continue to beat a path to their doors. While x-rated businesses may no longer be located on every street corner and may no longer dominate the Times Square area, as long as the current demand for them exists their numbers will certainly not lessen.

It is true, however, as plaintiffs contend that instant

availability to pornography on demand will be eliminated from some sections of the City. It is also true that those who seek to patronize adult establishments may be minimally inconvenienced by the need to travel a bit to satisfy their desires and that the owners and operators of certain adult establishments may sustain some economic hardship as a result of the Amended Zoning Resolution. As discussed above, none of those factors render the Amended Zoning Resolution constitutionally infirm (see, Young v American Mini Theatres, 427 US, supra, at 79 [Powell, J., concurring]).

Accordingly, the City's motions for summary judgment are granted, and the plaintiffs' motions for summary judgment are denied. The Stringfellow's, Amsterdam Video and Hickerson actions are hereby dismissed, and the clerk is directed to enter judgments dismissing these actions. The court declares that the Amended Zoning Resolution does not violate plaintiffs' rights of freedom of expression guaranteed under the State Constitution, and is, therefore, constitutional.

First Amendment to the Federal Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the peaople peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, § 8 of the New York State Constitution

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

TEXT AMENDMENT IN 950384 ZRY TO THE ZONING RESOLUTION OF THE CITY OF NEW YORK

N 950384 ZRY
Reso. No. 1322 (L.U. No. 713)

The Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended, is further amended as follows:

Matter in Graytone is new, to be added:
Matter in ~~strikeout~~ is old, to be deleted:
Matter within # # is defined in Section 12-10;
*** indicates where unchanged text appears in the Zoning Resolution

***

~~11-113~~
~~For adults establishments~~

~~Notwithstanding any other provision of this Resolution to the contrary, in all districts, no new #adult establishment# shall be allowed, nor shall any existing #adult establishment# be #enlarged# or #extended#, nor shall any #non-conforming use# be changed to an #adult establishment#, for an interim period of one year from the effective date of this amendment.~~

***

12-10
DEFINITIONS

***

~~Adult Establishment~~
~~An "adult establishment" is a #use# which includes:~~

~~(a) Adult bookstore - an establishment listed in Use Group 6 of 12 having as a significant portion of its stock in trade books, magazines, other periodicals, films, slides or video tapes, and which establishment is customarily not open to the public because it excludes minor by reason of age; or~~

~~(b) Adult eating or drinking establishment on eating or drinking establishment listed in Use Group 6A, 6C, 10 or 12A which customarily presents topless or nude dancers, stripers or similar entertainments, and which establishment is customarily not open to the public because it excludes minors by reason of age; or~~

~~(c) Adult theater - an establishment listed in Use Group 8 or 13 which customarily presents motion pictures, films, videotapes, slide shows, or live performance featuring topless or nude dancers, strippers or similar entertainments, including an establishment where such entertainment is viewed from an enclosure, and which establishment is customarily not open to the public because it excludes minors by reason of age.~~

Adult Establishment
An "adult establishment" is a commercial establishment where a "substantial portion" of the establishment includes an adult book store, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or any combination thereof, as defined below:

(a) An adult book store is a book store which has as a "substantial portion" of its stock-in-trade any one or more of the following:

(1) books, magazines, periodicals or other printed matter which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or,

(2) photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

(b) An adult eating or drinking establishment is an eating or drinking establishment which regularly features any one of more of the following:

(1) live performances which are characterized by an emphasis on "specified anatomical areas" or "specified sexual activities"; or,

(2) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or,

(3) employees who, as part of their employment, regularly expose to patrons "specified anatomical areas," and

which is not customarily open to the general public during such features because it excludes minors by reason of age.

(c) An adult theater is a theater which regularly features one or more of the following:

(1) films, motion pictures, video cassettes, slides r similar photographic reproductions characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas"; or,

(2) live performances characterized by an emphasis on "specified anatomical areas" or "specified sexual activities," and

which is not customarily open to the general public during such features because it excludes minors by reason of age.

An adult theater shall include commercial establishments where such materials or performance are viewed from individual enclosures.

(d) An other adult commercial establishment is a facility - other than an adult book store, adult eating and drinking establishment, adult theater, commercial studio, or business or trade school - which features employees who as part of their employment, regularly exposure to patrons "specified anatomical areas" and which is not customarily open to the general public during such features because it excludes minors by reason of age.

For the purpose of defining #adult establishment#, "specified sexual activities" are: (i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast.

"Specified anatomical areas" are: (1) less than completely and opaquely concealed: (a) human genitals, public region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discrenibly turgid state, even if completely and opaquely concealed.

For the purpose of determining whether a "substantial portion" of an establishment includes an adult bookstore, adult eating or drinking establishment, adult theater, or other adult commercial establishment, or combination thereof, the following factors shall be considered: (1) the amount of #floor area# and #cellar# space accessible to customers and allocated to such uses as compared to the total #floor area# and #cellar# space accessible to customers in the establishment.

For the purpose of determining whether a bookstore has a "substantial portion" of its stock in materials defined in paragraphs (a) (1) or (a) (2) hereof, the following factors shall be considered: (1) the amount of such stock accessible to customers

as compared to the total stock accessible to customers in the establishment; and (2) the amount of #floor area# and #cellar# space accessible to customers containing such stock as compared to the total #floor area# and #cellar# space accessible to customers in the establishment.

***

32-00
GENERAL PROVISIONS

In order to carry out the purposes and provisions of this Resolution, the #use# of #buildings or other structures# and of tracts of land have been classified and combined into Use Groups. A brief statement is inserted at the start of each Use Group to describe and clarify the basic characteristics of that Use Group. Use Group 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, including each #use# listed separately therein, are permitted in #Commercial Districts# as indicated in Sections 32-11 to 32-25, inclusive - except that any such #use# which is also an #adult establishment# shall, in addition, be subjected to the provisions of Section 32-01 (Special Provisions for Adult Establishments).

32-01
Special Provisions for Adult Establishments

In addition to the applicable regulations for the #uses# listed in a permitted Use Group, #adult establishments# shall be subject to the following provisions:

(a) #adult establishments# are not permitted in C1, C2, C3, C4, C5, C6-1, C6-2, or C6-3 Districts;

(b) in C6-4, C6-5, C6-6, C6-7, C6-8, C6-9, C7 or C8 Districts, #adult establishments# shall be located at least 500 feet from a church, a #school#, a #residence district#, a C1, C2, C3, C4, C5-1, C6-1, C6-2, OR C6-3 district, or a #manufacturing district# other than M1-6M in which new #residences#, new #joint living-work quarters for

artists# or new #loft dwellings# are allowed, under the provisions of the Zoning Resolution, as-of-right or by special permit or authorization. However, on or after the effective date of this amendment, an #adult establishment# that otherwise complies with the provision of this paragraph shall not be rendered ‚Äúnon-conforming# if a church or a #school# is established on or after April 10, 1995 within 500 feet of such #adult establishment#.

(c) In C6-4, C6-5, C6-6, C6-7, C6-8 C6-9, C7, or C8 Districts, #adult establishments# shall be located at least 500 feet from another #adult establishment#.

(d) in C6-4, C6-5, C6-6, C6-7, C6-8, C6-9, C7 or C8 Districts, no more than one #adult establishment# permitted under this Section shall be located on a #zoning lot#.

(e) in C6-4, C6-5, C6-6, C6-7, C6-8, C6-9, C7 or C8 Districts, #adult establishment# shall not exceed in total 10,000 square feet of #floor area# and #cellar# space not used for enclose storage or mechanical equipment.

(f) #adult establishments# which existed on the effective dated of this amendment and conform to all provisions of the Zoning Resolution relating to #adult establishments# other than the provisisons of all or any combination of paragraphs (c), (d), and (e) of this Section, shall not be subject to the provisions of Section 52-77 (Termination of Adult Establishments).

***

32-60
SIGN REGULATIONS

***

32-62
Permitted Accessory Business Signs
C1, C2, C3, C4, C5, C6, C7, C8

In all districts, as indicated #accessory business signs# are permitted subject to the provisions of the following Sections:

***

Section 32-69 (Additional Accessory Business Sign Regulations for Adult Establishments)

***

32-69
Additional Accessory Business Sign Regulations for Adult Establishments
C6-4, C6-5, C6-6, C6-7, C6-8, C6-9, C7, C8

#Accessory business signs# for #adult establishments# are permitted only as set forth in this Section, and are limited to locations in the districts indicated.

All permitted #accessory business signs# for #adult establishments# shall conform with all the #sign# regulations applicable in CI Districts as set forth in this Chapter, except that the provisions of Section 32-64 (Surface Area and Illumination Provisions) shall not apply. In lieu thereof, the maximum #surface area# of all #accessory business signs# for #adult establishments# shall not exceed, in the aggregate, three times the #street# frontage of the #zoning lot#, but in no event more than 150 square feet per establishment, of which no more than 50 square feet may be #illuminated non-#flashing signs#.

***

42-00
GENERAL PROVISIONS

In order to carry out the purposes and provisions of this Resolution, the #uses# of #building or other structures# and of tracts of land have been classified and combined into Use Groups. A brief statement is inserted at the start of each Use Group to describe and clarify the basic characteristics of that Use Group. Use Groups 4B,

4C, 5, 6A, 6B, 7, 8, 9B, 9C, 10B, 10, 11, 12A, 12C, 12D, 12E, 13, 14, 16, 17 or 18, including each #use# listed separately therein and certain #uses# in Use Groups 3A, 6C, 9A, 10A, or 12B are permitted in #Manufacturing Districts# as indicated in Sections 42-11 to 42-15, inclusive - except that any such #use# which is also an #adult establishment# shall, in addition, be subject to the provisions of Section 42-01 (Special Provisions for Adult Establishments).

42-01
Special Provisions for Adult Establishments

In addition to the applicable regulations for the #uses# listed in a permitted Use Group, #adult establishments# shall be subject to the following provisions:

(a) #adult establishments# are not permitted in a #manufacturing district# in which #residences#, joint living-work quarters for artists# or #loft dwellings# are, under the provisions of the Zoning Resolution, allowed as-of-right or by special permit or authorization.

(b) In all other #manufacturing districts#, adult establishments# shall be located at least 500 feet for a church, a #school#, a #residence district#,, a C1, C2, C3, C4, C5-1, C6-1, C6-2, or C6-3 district, or a #manufacturing district# other than M1-6M in which new #residences#, new #joint living-work quarters for artists# or new #loft dwellings# are allowed, under the provisions of the Zoning Resolution, as-of-right or by special permit or authorization. However, on or after the effective date of this amendment, an #adult establishment# that otherwise compiles with the provision of this paragraph shall not be rendered #non-conforming# if a church or a #school# is established on or after April 10, 1995 within 500 feet of such #adult establishment#.

(c) #adult establishments# shall be located at least 500 feet from another #adult establishment#.

(d) no more than one #adult establishment# permitted under the

Section shall be located on a #zoning lot#.

(e) That #adult establishments# shall not exceed in total 10,000 square feet of #floor area# and #cellar# space not used for enclosed storage or mechanical equipment.

(f) #adult establishments# which existed on the effective date of this amendment and conform to all provisions of the Zoning Resolution relating to the #adult establishments# other than the provisions of all or any combination of paragraphs (c), (d), and (e) of this Section, shall not be subject to the provisions of Section 52-77 (Termination of Adult Establishment).

***

42-50
SIGN REGULATIONS

***

42-52
Permitted Accessory Business Signs or Advertising Signs
M1, M2, M3

In all districts, as indicated, #accessory business signs# or #advertising signs# are permitted with no restrict on size, illumination other otherwise, except as ~~otherwise~~ provided in Section 42-54 (Special Provisions Applying along District Boundaries) and subject to the provisions of Section 42-53 (Additional Regulations for Advertising Signs) ~~and Section 42-55 (Additional Regulations for Business and Advertising Signs in Certain Manufacturing Districts),~~ and Section 42-55 (Additional Accessory Business Sign Regulations for Adult Establishments).

***

42-55

Additional Accessory Business Signs Regulations for Adult Establishment
M1. M2, M3

In all districts, as indicated, all permitted #accessory business signs# of #adult establishments# shall conform with the provisions of this Chapter, except that that maximum #surface area# of all #accessory business signs# for #adult establishments# shall not exceed, in the aggregate, three times the #street# frontage of the #zoning lot#, but in no event more than 150 square feet per establishment, of which no more than 50 square feet may be #illuminated# and no portion thereof may be #flashing#.

No #accessory business signs# for #adult establishments# shall be permitted on the roof of any #building#, nor shall such signs extend above #curb level# at a height greater than 25 feet.

ARTICLE V
NON-CONFORMING USES AND NON-COMPLYING BUILDINGS

CHAPTER 1
STATEMENT OF LEGISLATIVE INTENT

51-00
PURPOSE OF REGULATIONS GOVERNING NON-CONFORMING USES AND NON-COMPLYING BUILDINGS

***

In the case of a few objectionable non-conforming uses which are detrimental to the character of ~~residence~~ the district in which such uses are located, a reasonable statutory period of life is established for such uses, in order to permit the owner gradually to make ~~his~~ plans for the future during the period when ~~he~~ the owner is allowed to continue the non-conforming uses of ~~his~~ the property, thereby minimizing any loss, while at the same time assuring the pubic that

the district in which such non-conformity exists will eventually benefit from a more nearly uniform character.

***

52-30
CHANGE OF NON-CONFORMING USE

***

52-38
Special Regulations for Adult Establishments

In all districts, a #non-conforming use# may not be changed, initially or in any subsequent change, to an #adult establishment#, except as provided in Section 32-01 (Special Provisions for Adult Establishments) or Section 42-01 (Special Provisions for Adult Establishments).

***

52-70
TERMINATON OF CERTAIN NON-CONFORMING USES AFTER AMORTIZATION

52-71
General Provisions

In specified districts, specific #non-conforming signs#, specific #non-conforming uses# of #land with minor improvements#, specific #non-conforming# objectionable #uses#, certain specific types of #uses# involving open storage or salvage, #non-conforming# #adult establishments#, or certain #non-conforming public parking lots# may be continued for a reasonable period of useful life as set forth in this Chapter, provided that after the expiration of that period such #non-conforming uses# shall terminate in accordance with the provisions of this Chapter.

***

52-73
Non-conforming Signs

***

52-734
Non-conforming accessory business signs for adult establishments

In all districts, a #non-conforming accessory business sign# for an #adult establishment# shall terminate within one year from the effective date of this amendment or from such later date that such #sign# becomes #non-conforming#, except that such #sign# may be continued for a limited period of time by the Board of Standards and Appeals pursuant to Section 72-40 (Amortization of Certain Adult Establishments and Signs for Adult Establishments).

***

52-77
Termination of Adult Establishments

In all districts, a #non-conforming# #adult establishment# shall terminate within one year from the effective date of this amendment or from such later date the #adult establishment# becomes #non-conforming#, except that such establishment may be continued for a limited period of time by the Board of Standards and Appeals pursuant to Section 72-40 (Amortization of Certain Adult Establishments and Signs for Adults Establishments). However, the provisions of this Section shall not apply to a #adult establishment# subject to the provisions of paragraph (f) of Section 32-01 or 42-01 (Special Provisions for Adult Establishments).

***

52-80
REGULATIONS APPLYING TO NON-CONFORMING SIGNS

***

52-82
Non-Conforming Business Signs

Any #non-conforming accessory business sign#, except a #flashing sign# or a #sign# subject to the provisions of Section 52-734 (Non-conforming accessory business signs for adult establishments), may be structurally altered, reconstructed, or replaced in the same location and position, provided that such structural alteration, reconstruction, or replacement does not result in:

(a) the creation of a new #non-conformity# or an increase in the degree of #non-conformity# of such #sign#;

(b) an increase in the #surface area# of such #sign#; or

(c) an increase in the degree of illumination of such #sign#.

***

72-01
General Provisions

The Board of Standards and Appeals (referred to hereinafter at the Board) shall have the power, pursuant to the provisions of the New York City Charter and of this Resolution, after public notice and hearing:

***

to make such administrative determinations and findings as may be set forth in this Resolution at Sections 15-021 and 15-50 et seq., or pursuant to Section 72-40 (Amortization of Certain Adult Establishments and Signs for Adult Establishments).

***

72-40
AMORTIZATION OF CERTAIN ADULT ESTABLISHMENTS AND SIGNS FOR ADULT ESTABLISHMENTS

***

The Board of Standards and Appeals may permit any #non-conforming# #adult establishment# or any #non-conforming accessory business sign# for an #adult establishment# to continue for a limited period of time beyond that provided for in Section 52-734 (Non-conforming accessory business signs for adult establishments) or Section 52-77 (Termination of Adult Establishments), provided that:

(a) an application is made by the owner of such establishment to the Board of Standards and Appeals at least 120 days prior to the date on which such establishment or #sign# must terminate;

(b) the Board shall find, in connection with such establishment or #sign#, that:

(1) the applicant had made, prior to the #non-conformity#, substantial financial expenditures related to the #non-conformity#; and,

(2) the applicant has not recovered substantially all of the financial expenditures related to the #non-conformity#; and

(3) the period for which such establishment or #sign# may be permitted to continue is the minimum period sufficient for the applicant to recover substantially all of the financially expenditures incurred related to the #non-conformity#.

For the purpose of this Section, "financial expenditures" shall mean the capital outlay made by the applicant to establish the #adult establishment# or #sign#, exclusive of the fair market value of the

#building# in which such #use# or #sign# is located and exclusive of any improvements unrelated to the #non-conformity# #adult establishment# or #non-conformity accessory business sign# for #adult establishments#.

***

Supreme Court, U.S.
FILED
DEC 2 1998
CLERK

Nos. 98-569, 98-574

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

-v.-

THE CITY OF NEW YORK, *et al.*,

Respondents.

RACHEL HICKERSON, DEREK JONES, TY McCONNELL, and ELLIOT STAMLER,

Petitioners,

-v.-

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY RESPONDENTS' BRIEF IN OPPOSITION

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December 1, 1998

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COUNTER-QUESTIONS PRESENTED

1. Pursuant to the full faith and credit statute, 28 U.S.C. § 1738, and this Court's precedent, was the Second Circuit's affirmance of the denial of a preliminary injunction proper on the grounds of the application of issue preclusion or collateral estoppel, where there was extensive litigation in New York state court, plaintiffs' chosen forum, culminating in a final determination by New York's highest court, the New York Court of Appeals, in *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998), which made findings of fact and law, and employed the standards set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in upholding the City of New York's adult use zoning ordinance?

2. In any event, given the controlling precedent in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opin.), was the denial of a preliminary injunction proper where the challenged adult use zoning ordinance is facially valid under the First Amendment of the United States Constitution given that it is content-neutral, narrowly tailored to serve important governmental interests, and provides reasonable alternative means of communication?

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COUNTER-STATEMENT OF THE CASE

Respondents, the City of New York, *et al.* ("the City"), respectfully request that this Court deny the petitions by the separate petitioners, Amsterdam Video, Inc., *et al.* ("*Amsterdam*") and Rachel Hickerson, *et al.* ("*Hickerson*") (collectively, "petitioners"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 3, 1998 (A-3-32).[1] The Second Circuit affirmed a judgment of the District Court for the Southern District of New York, which denied a preliminary injunction against enforcement of the City's adult use zoning ordinance based on application of the full faith and credit statute, 28 U.S.C. § 1738, and the law of issue preclusion or collateral estoppel, given the New York State courts' rejection of petitioners' claims. *Hickerson v. City of New York*, 146 F.3d 99 (2d Cir.), *aff'g*, 997 F. Supp. 418 (S.D.N.Y.), *stay denied sub nom. Amsterdam Video v. City of New York*, 119 S. Ct. 4 (1998) (A-3-32, A-33-44).

In relevant part, following extensive litigation, the State's highest court, the New York Court of Appeals, rendered a final determination upholding the City's adult use zoning ordinance, including findings of fact and law. *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998) ("*Stringfellow's*") (A-45-67). In rejecting petitioners' free expression claims under the New York Constitution, it applied the standard for validity of an adult use zoning ordinance set forth by this Court

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[1] To avoid unnecessary duplication, numbers and letters in parentheses preceded by "A-_." refer to the Appendix to the Petition for a Writ of Certiorari filed by the *Amsterdam* petitioners, while the separate *Hickerson* petitioners' Appendix will be referred to as "_a," only for material not contained in the *Amsterdam* Appendix. Numbers in parentheses preceded by the letters "JA" or "SA" refer to pages in the Joint Appendix ("JA___") or the Supplemental Appendix ("SA __") in the Second Circuit.

in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ("*Renton*"), which is, in all material respects, identical to the New York constitutional standard. Thus, upon review of the extensive legislative record, the State courts found that the ordinance is content-neutral, imposes a measured set of land use restrictions on those adult establishments that have consistently been shown to produce negative secondary impacts, and that there are ample reasonable alternative avenues of communication.

Given the identity of the federal and state standards, the Circuit correctly held that, under the full faith and credit statute and governing precedent, including *Allen v. McCurry*, 449 U.S. 90 (1980) and *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), the New York courts' findings are dispositive of the federal constitutional issue based upon well-settled principles of issue preclusion or collateral estoppel.

Background of the Legislation.

The background facts are summarized in the Circuit's opinion (A-8-9, 12-13). Further discussions are contained in the State court opinions in *Stringfellow's* (A-45-67, 95-122a; *post*, pp. 11-15) and the Circuit's opinion upholding the ordinance in *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir.), *cert. denied*, 119 S. Ct. 54 (1998) ("*Buzzetti*").

The extensive legislative record leading up to the passage of the Amendment to the New York City Zoning Resolution governing adult use establishments illustrates its reasonableness (JA931-94). In brief, in recent years, growing concerns were expressed by City residents and their elected officials as to the significant proliferation of sexually-oriented adult entertainment establishments and their adverse community impacts,

particularly in residential areas. In response, the City's land use planning bodies, the Department of City Planning ("DCP") and the City Planning Commission ("CPC"), conducted a thorough analysis of whether the City should adopt zoning regulations of adult establishments (JA916-17, SA6-7).[2]

The DCP's Adult Entertainment Study ("the DCP Study"), completed in the fall of 1994, contains a survey of adult use studies performed by many other municipalities, as well as prior City studies and DCP's own survey of selected study areas (JA918, SA8-15). The DCP Study concluded that adult entertainment constituted a serious, growing problem and recommended restrictions (JA918). As detailed in *Buzzetti,* the DCP Study (*id.*, 140 F.3d at 136):

> noted that studies from other cities had documented numerous "negative secondary impacts of such establishments, including "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life." DCP Study at 67. These effects were consistent with the experience of those areas of New York City marked by high concentrations of adult entertainment establishments . . . Even in areas where adult establishments were not heavily concentrated,

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[2] Such establishments include adult book and video stores, which often provide booths for on-premises viewing, adult theaters, which may offer movies or live entertainment, and topless or nude bars. Once found predominantly in Times Square and a few other areas, adult establishments more recently opened and proliferated in neighborhoods where they had not previously been located, including numerous triple-X video stores and nude bars in or near residential neighborhoods in the City, such as Chelsea, Sunset Park, Sunnyside and Forest Hills (JA916, SA6-7, 19).

residents, businesses, and community leaders feared the consequences of possible future proliferation ....

After the City Council enacted a one-year interim zoning moratorium in 1994, and based upon the DCP Study and thorough public hearings, the CPC issued a detailed report and approved the permanent comprehensive Zoning Amendment (SA15-20; JA971; *Buzzetti*, 140 F.3d at 136). After further public hearings, on October 25, 1995, the City Council approved the Amendment, effective that date (SA21).

The Permanent Adult Use Zoning Amendment.

The permanent adult use Zoning Amendment ("the Amendment") does not forbid the operation of any category of business, but instead restricts the zoning areas in which an "adult establishment" may be operated (124-34a; JA918-19, 120-41). An adult establishment is defined, *inter alia*, as a commercial establishment which is: an "adult book store," an "adult eating and drinking establishment," an "adult theater," or "other adult commercial establishment." N.Y.C. Zoning Resolution ("ZR"), § 12-10. These establishments "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities," which terms are also defined in § 12-10 (SA21). Identical or similar definitions are used in many of the adult use zoning ordinances throughout the country (SA21-22).

The centerpiece of the Amendment is a set of locational restrictions and anti-concentration provisions that are designed to shield the City's residential neighborhoods, and the facilities and commercial areas that serve them, from the negative impacts produced by adult uses (JA919, SA23). Even before

these regulations were adopted, the general regulatory scheme embodied in the Zoning Resolution prohibited new commercial development in residentially-zoned districts (*id.*). Under the Amendment, adult uses are barred from certain districts zoned for commercial and manufacturing uses, but which also permit new residential development (ZR, §§ 32-01[a], 42-01[a]).

Adult establishments continue to be allowed in all high-density commercial and virtually all manufacturing districts that are mapped throughout the City and in which a wide variety of retail, entertainment and other commercial uses are permitted (ZR, §§ 32-01[b], 42-01[b], SA24-25, *post*, pp. 8-9). In these districts, however, they must be located at least 500 feet from any school or house of worship and from most zoning districts in which new residential uses are allowed (*id.*). To prevent concentration, a new adult use must be located at least 500 feet from any other adult use (ZR, §§ 32-01[c], 42-01[c]).[3]

Background of the Actions.

These parallel actions were commenced in New York Supreme Court in February 1996 (JA20, 197, 921). The *Amsterdam* plaintiffs are owners or operators of adult establishments, while the *Hickerson* plaintiffs are customers

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[3] Aside from some exceptions with respect to certain pre-existing adult uses (ZR §§ 32-01[b].[f], 42-01[b].[f]), the Amendment generally required existing non-conforming adult establishments to come into conformity or terminate within one year of the effective date, *i.e.*, by October 26, 1996 (*id.*, §§ 52-734, 52-77; JA496-97). It also provided that, upon a timely application with the requisite showing by an owner of a non-conforming adult establishment, the City's Board of Standards and Appeals could allow it to be maintained for more than one year from the effective date (ZR § 72-40; SA25-27). Neither petitioners or any other business chose to make a proper and timely application (A-65-66).

thereof (JA921-22).[4] Both complaints asserts deprivation of the rights of free expression under the State and Federal Constitutions, with 13 of the 14 causes of action in the *Amsterdam* complaint alleging purely State constitutional violations (JA20-112, 113-15; *see also* JA172-98).

In March 1996, defendants removed the actions to District Court pursuant to 28 U.S.C. § 1441 (JA15-19, 167-71, 922).

Vigorously objecting, plaintiffs sought a remand to State court (JA209-34, 254-56). They argued that State court was their chosen forum to litigate all their claims, both state and federal, that the state law claims predominated, and that the New York Constitution affords expressive activity greater protection than the Federal Constitution (JA228, ¶¶ 47-48).

For example, the *Amsterdam* plaintiffs' counsel's supporting affirmation states that the federal issue is "minor and subordinate (JA228 ¶ 48), and that their state constitutional claims "predominate[d]," while their First Amendment claim was a mere "adjunct" or "supplement" (JA227, quoted by Circuit at A-24-25). Their legal memorandum also stated that: "No credible claim can be made that a federal court is in a better position than the New York State court to inquire into

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[4] The named City defendants are the City of New York, Mayor Rudolph W. Giuliani, Gaston Silva, Commissioner of the Department of Buildings, and Joseph B. Rose, the CPC Chairperson and DCP Director (JA46-47, 174-76). The separate intervenors-defendants are the Times Square Business Improvement District and the Center for the Community Interest, among other community groups (JA1015, 1237).

the adequacy and suitability of [the alternative] sites" (*Amst.* Mem., 4/96, p. 20).[5]

On June 27, 1996, the District Court remanded all the state law claims, retaining jurisdiction over the federal claims, but staying adjudication thereof. *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996) (A-68-86).

The Extensive State Court Litigation.

Following the remand, the *Amsterdam* and *Hickerson* actions were assigned to Justice Marylin G. Diamond and were informally consolidated with a third action challenging the Amendment, *Stringfellow's v. City of New York* (JA922).

In July 1996, following a preliminary injunction motion by the *Stringfellow's* plaintiffs, and upon the City's indication that it would cross-move for summary judgment upholding the *prima facie* validity of the law, all the parties and the Court agreed upon a briefing schedule to resolve the matter by October 26, 1996, the effective date for compliance after the one-year amortization period (*Stringfellow's* Appen. at A1673-74). In August 1996, in accord with the schedule, defendants cross-moved for summary judgment declaring the Amendment valid (JA922-23). Plaintiffs then filed papers to reserve their federal claims under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (JA309-15).

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[5] So too, the *Hickerson* petitioners stated: "Here, the plaintiffs' principal claim is that the New York City zoning ordinance violates . . . the New York Constitution," reducing to a footnote that they "also" asserted federal claims (*Hick.* Mem., 4/16/96, p. 9 & n.3), and that they should be able to litigate their claims, which "should be decided by the State courts," in "their chosen forum" (*Hick.* 5/21/96 Reply Mem., pp. 3, 4).

The City submitted supporting affidavits by several City Planning officials: Joseph B. Rose, CPC Chairperson and DCP Director (SA4-29), William Bernstein, DCP First Deputy Executive Director (SA30-38), and Andrew Lynn, DCP Executive Director (SA39-43). It also submitted virtually the entire several thousand page legislative record before the City Council (which included the DCP Study and CPC Report), and a series of detailed maps (JA923).

In addition to the legislative background (*ante*, pp. 2-5), these affidavits detailed how the Amendment provides ample access to adult entertainment and materials (JA920-21, SA27-28). Adult establishments may operate in all high density commercial and virtually all manufacturing zoning districts, that are mapped throughout the City, and which areas permit a broad range of retail, amusement, recreational and other commercial and industrial uses (112-14a; SA31-38).[6] These areas include portions of midtown Manhattan, a large swath along its West Side, Sunset Park, Brooklyn, northern Astoria and other parts of Queens, the South Bronx and the western shore of Staten Island (SA32-38).

These districts are well-served by major highways, thoroughfares and mass transit, and DCP showed that all of the permissible Manhattan areas, and at least 80% of such areas in the other boroughs, are within a 10-minute walk of a rapid transit line or major bus route (SA32).

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[6] As the State Supreme Court found, the in-depth examination of Manhattan, including six districts below 59th Street, where about 100 adult establishments were operating, and where 75 may remain, is "especially compelling" (112-14a; SA33-34). The Court also found that that "specific analysis belies" plaintiffs' bald allegations of being forced into outer boroughs (113a).

In addition, DCP calculated that the areas in which adult uses are permitted are more than 11% of the City's total land area, and about 4% of the area when reduced by certain properties unlikely to be developed for commercial use (SA28, JA989). DCP estimated that the Amendment allows for the operation of approximately 500 adult establishments, each of which may have up to 10,000 square feet of usable floor area (SA28, JA989).[7] Given that about 177 adult establishments were operating in the City and the fact that the vast majority of those establishments occupy far less than 10,000 square feet, the Amendment not only permitted all of the existing adult establishments to continue to operate, either at their current sites or new locations, but also accommodated a significant expansion of the adult use market (SA28-29, 38, JA950-51).

The City also demonstrated that its manufacturing districts are very suitable for new commercial development and that the City encourages a mix of commercial and industrial uses and activity therein (SA40-41). As a general matter of land use policy, the City's Zoning Resolution permits almost all commercial uses -- retail, office, service and entertainment -- in manufacturing districts, and a significant amount of commercial activity takes place in these districts (SA40-41). These districts contain an ample amount of property available at affordable prices, with about 22% of the property characterized as vacant land or buildings (SA41-42).

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[7] This estimate takes into account the locational restrictions, as well as discounting as potential sites certain properties that are unlikely to be developed for any commercial use, referred to as "encumbered" areas (SA28). These areas include those occupied with public utilities or oil storage facilities; property designated as wetlands by the State Department of Environmental Conservation; publicly-owned vacant property of more than 10,000 square feet; areas under active consideration for rezoning that would prohibit adult uses; and sites fronting on built roadways (SA28).

Even though a summary judgment motion ordinarily stays discovery, N.Y. C.P.L.R. §§ 3212(a), 3214(b), particularly in facial legislative challenges, nonetheless, at plaintiffs' urging, the State Court allowed some discovery to be conducted prior to decision, while continuing to deny indefinite extensions to the agreed schedule. At the Court's direction, defendants, *inter alia*, answered interrogatories and provided pre-enactment maps that showed the areas where adult uses are permitted when encumbered areas are eliminated (JA974-75, SA42-43).

In addition, while the Court had entered an order on August 22, 1996 denying further discovery without leave, thereafter, upon the *Hickerson* plaintiffs' application, it granted leave and directed defendants to produce for deposition a person familiar with DCP's calculation of the total number of adult establishments permitted. On September 3, 1996, defendants produced Marilyn Mammano, DCP's Director of Zoning and Urban Design (JA974-75, 849-910), who supervised the staff who actually performed the calculation, which was done prior to enactment (JA872, p.87).[8]

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[8] Ms. Mammano explained that DCP had prepared maps of each borough, which showed the permissible areas, the locations of "sensitive receptors," such as schools and churches, and the properties that were unlikely to be developed for any commercial uses, *i.e.*, the "encumbered" areas (JA851-95, SA42-43). The maps were prepared by computer, using data from various government sources and the results of field surveys by DCP staff, who had personally visited many of the areas (JA861, p. 46, SA42-43). Using those maps and a scaled measuring device, DCP staff measured 500 foot intervals along the street network within the areas where adult uses were to be permitted, but excluding the encumbered areas and areas surrounding sensitive receptors. DCP estimated, conservatively, that about 500 adult establishments are allowed under the Amendment (JA973, p. 92; JA861-62, pp. 43-47; JA869, p. 75; JA956-57).

Notably, in response to defendants' motions, both the *Amsterdam* and *Stringfellow's* plaintiffs cross-moved for summary judgment (JA974). All plaintiffs submitted extensive opposing affidavits, including a lengthy 106-page affidavit of R. Bruce McLaughlin, a Florida-based land use planning consultant (A385-491). That affidavit consisted largely of broad conclusory allegations and legal argument about, *inter alia*, the alleged unsuitability of manufacturing districts for commercial use, as well as the alleged unsuitability of such areas as vacant land, parking lots, or property with existent leases (*id.*; *see* JA990-92).[9]

The Lower State Court Opinions.

By lengthy, well-reasoned opinion entered October 23, 1996, the State Supreme Court granted the City's cross-motion for summary judgment upholding the Amendment and dismissed the three actions. *Stringfellow's v. City of New York*, 171 Misc. 2d 376 (Sup. Ct., N.Y. Co. 1996) (95-122a). It upheld its validity under the New York Constitution based on *Town of Islip v. Caviglia*, 73 N.Y.2d 544 (1989) ("*Islip*"), which used standards parallel to *Renton* (102-105a).

First, the Court found that the voluminous legislative record provided ample evidence that adult establishments tend

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[9] Plaintiffs claimed insufficient time to respond, ignoring the agreed-upon schedule and the fact that other potentially relevant information was not within defendants' exclusive custody, such as public transit maps (JA958, 118-19a). As the State Courts also stressed: 1) plaintiffs commenced the actions some six months earlier and their counsel had actively participated in the long, open public review process preceding passage in October 1995; 2) their expert McLaughlin had familiarity with that process and had done a lengthy 198-page predicate study in August 1995 based upon a draft of the Amendment (A-63-65; 117a; JA492-690).

to produce certain negative impacts in the communities that surround them, and that the City's adult regulations were designed, not to suppress expression, but to address these *legitimate land use concerns* (106-10a). Thus, they were no broader than necessary to achieve their purposes (110-11a).

The Court also held that the regulations provided reasonable alternative avenues of communication or ample space throughout the City for adult establishments, citing both *Renton* and *Islip* (111-15a). The Court found that defendants' evidence, particularly the City Planning officials' affidavits, established, among other things, that: 1) adult establishments are permitted in a number of commercial and manufacturing zoning districts which permit a wide range of retail, recreational, entertainment and other commercial uses; 2) the districts are well-served by both mass transit and highways, with generally at most a 10-minute walk to a bus or subway line; and 3) incorporating all of the locational and separation requirements, about 500 adult establishments may lawfully operate in the City (far more than the 147 of 177 total establishments which would have to relocate) (112-15a).

Furthermore, plaintiffs did not come forward with legally sufficient countervailing evidence (115-19a). Having closely examined the affidavit of their expert McLaughlin, which contended that the number of available sites was much smaller than defendants' estimate, the Court found McLaughlin's methodology to be "fatally flawed" because he unjustifiably eliminated numerous sites based on such factors as use as a warehouse or parking lot, the undeveloped state of the site, presence of a long-term lessee, and lease clauses prohibiting adult uses (116-17a). Noting that the exclusion of such factors has been repeatedly rejected by state and federal courts,

including this Court in *Renton*, the State Court held that plaintiffs failed to rebut defendants' evidence, stating (117a):

> Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP [*see* JA401, ¶ 37], he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.[10]

The Court concluded that plaintiffs failed to raise any issue of fact requiring a trial and that defendants were entitled to summary judgment (119a). After having allowed various discovery, the Court rejected requests for additional discovery in this facial challenge, finding the record "thorough, extensive and comprehensive" and that there was no showing that necessary information was in defendants' exclusive custody (*id.*). Thereafter, the Appellate Division unanimously affirmed, citing *Islip* and *Renton*. *Stringfellow's v. City of New York*, 241 A.D.2d 360 (1st Dept. 1997) (92-94a).

The New York Court of Appeals' Opinion.

On February 24, 1998, the Court of Appeals unanimously affirmed the order below, agreeing with the lower courts that the Amendment comports with state and federal constitutional standards governing adult uses, which are substantially the

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[10] The Court rejected the contention that the estimate was invalid because it was generated by computer and not by inspection of all of the actual sites, also noting that it was based on conservative measurements (118a).

same under *Islip* and *Renton*. *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998) (A-45-67).[11]

Upon thorough review, the Court of Appeals held: "In view of the legislative record upon which the City Council rested its decision . . ., we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose" (A-58). It also found that the Amendment is no broader than necessary and is "a coherent regulatory scheme" which "protect[s] only those communities and community institutions that are most vulnerable to the adverse impacts of adult uses" (A-59-60).

Finally, employing the *Renton* standards, the Court of Appeals agreed that the Amendment left reasonable alternative avenues of communication available (A-61-65). The Court stated (A-62-63, quoted in Circuit opinion at A-15-16):

> Relying on a formula derived from *City of Renton v. Playtime Theatres*..., the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial warehouse, office and shopping space that

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[11] Plaintiffs' massive briefs totalled over 300 pages and fully discussed their preference to litigate in State court as their chosen forum (SA44-386). They argued that New York courts are more liberal on free speech than the federal courts (SA63, 76, 97), that reliance on *Renton* was "misplaced" and "unwarranted" (SA99, n.18, SA100, 126), and that *Renton* is not the law in New York (SA258). They also argued that they did not receive adequate discovery or a trial (SA226-40; 377-84, 119-36).

> is criss-crossed by freeways, highways and roads" (*id.*, at 53-54). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry [citations omitted]. Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those cites are part of an actual business real estate market (*see*, *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530-31 [(9th Cir. 1993)], cert [.] denied [,] 511 U.S. 1030...[(1994)]; . . .).
>
> In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see* [*Topanga*], 989 F.2d, at 1531).

The Court found that the evidence submitted by defendants established that, *inter alia*, under the regulations, at least 500 adult establishments will be able to operate within zoning districts "that permit a wide mix of commercial, retail, entertainment and manufacturing uses" (A-63). The Court found that the opposition's submissions did not contain "the hard factual data" necessary to refute any of that evidence and: "[g]iven this shortfall, the accuracy of the City's overall calculations was not called into serious question" (A-65).

The Federal Motions for Injunctive Relief.

Following the Court of Appeals' decision, plaintiffs sought a preliminary injunction in District Court enjoining defendants from enforcement. Their new affidavits included one from their expert McLaughlin, whose State court affidavit had failed to quantify the number of available sites. Within the five-day period given, he opined, for the first time, that there were only 90 available sites after excluding "unsuitable" sites (JA1019-75). Also submitted were a videotape and "transcript" of Mayor Giuliani's remarks at a February 24, 1998 press conference after the Court of Appeals' decision (JA911-14).

In their legal memoranda, plaintiffs acknowledged that the State courts made certain findings, including that: 1) the property where adult establishments may operate under the Amendment constitutes over 11% of the City's total land area and about 4% when reduced by encumbered properties that are unlikely to be developed for commercial use; 2) there are at least 500 potential sites for adult establishments to relocate and operate; and 3) all of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a subway line or a major bus route (A-63; *Hick.* Mem., pp. 12-13; *Amst.* Mem., p.17, n.7). In the Circuit, they again acknowledged these findings, including that more than 500 potential sites exist (*Amst.* Br., p.35, n.15; *Hick.* Br., pp. 5, 7).

The City defendants opposed the motions by declarations of Albert G. Fredericks (JA915-30, SA1-3), with annexed exhibits including the State opinions (JA931-1014), the State court affidavits by City Planning officials (SA4-43), and plaintiffs' New York Court of Appeals' briefs (SA44-386). The City urged that there was no likelihood of success based

on the application of collateral estoppel and, separately, on the merits under *Renton* (JA927-30).[12]

THE DISTRICT COURT OPINION

On March 6, 1998, after ample oral argument, the District Court denied a preliminary injunction (A-33-44). In a thorough opinion, it held that plaintiffs did not show a likelihood of success on the merits, a showing "particularly appropriate where a municipal regulation has been carefully examined by all [the State courts], including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights" (A-34-35).

After reviewing the litigation history (A-35-39), the Court held that the issues presented were precluded by the factual findings and determinations of the State courts (A-39-44). Citing, *inter alia*, *Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("*Allen*"), it noted the important purposes of collateral estoppel to protect ". . . litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy" and, where factual determinations by a state court are at issue, of "promot[ing] the comity between state and federal courts that has been recognized as a bulwark of the federal system" (A-39-40).

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[12] Defendants also noted that, upon examination of the new McLaughlin affidavit: (1) the new number could have been, but was never offered in state court (A-20 n.6); (2) McLaughlin's exclusions continued to suffer from the same legal infirmities unanimously found by all the State courts (*see* City Supp. D.Ct. Mem., 3/6/98). In particular, he eliminated property he found undesirable, such as property in industrial areas, vacant, undeveloped property, warehouses, parking lots, waterfront property, and property with long-term leases (JA1048-59), when such property has been consistently allowed as legally suitable in *Renton*, 475 U.S. at 53-54.

After reviewing the governing First Amendment standard set forth in *Renton*, and noting the extensive submissions reviewed by the State courts, the District Court held (A-40):

> Each of the inquiries set out by the Supreme Court in *Renton* -- the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication -- is a factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals.

The District Court rejected plaintiffs' argument that the *England* reservation of their federal claims barred application of issue preclusion, noting that plaintiffs' chosen forum was "emphatically" the state court and that they promptly sought a remand of all claims to their chosen state forum (A-41).

In then rejecting their argument that they were denied a full and fair opportunity to litigate in State court, the Court properly applied the controlling factors under New York law (A41-44). It recognized that the fact that a case is resolved on summary judgment does not deny a party a full and fair opportunity to litigate; a party is not entitled to unlimited discovery, and state court proceedings permitting no discovery can be entitled to preclusive effect (A-42). Further, "plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their . . . effort to prevent [the] City from requiring them to close and move their businesses" and were represented by experienced and highly competent counsel (A-42). Finally, they were permitted some

discovery and had a full opportunity to press their procedural grievances, and substantive claims, in State court (A-42).[13]

THE SECOND CIRCUIT OPINION

In a comprehensive opinion, on June 3, 1998, the Second Circuit unanimously affirmed the judgment (A-3-32). It held that the District Court did not abuse its discretion in denying a preliminary injunction because, based on the State court litigation, "plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim," and thus could not show "a likelihood of success" or even sufficiently serious questions on the merits (A-9-10).

In so doing, the Circuit reviewed the relevant case law and the full faith and credit statute, 28 U.S.C. § 1738, wherein '"Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so"' (A-10, *Allen*, 449 U.S. at 96). It agreed with the District Court that the issues and standards applied by the New York courts in rejecting the state constitutional challenge are the same that would be applicable to their First Amendment claim (A10-11,

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[13] The District Court noted that plaintiffs were allowed to take the Mammano deposition, which, despite their complaints, provided them with "a great deal of information . . . that they used to support their position, . . . including the degree of defendant[s'] investigation of alternative sites" (A-42-43). It detailed how the New York courts addressed the discovery demands, with Justice Diamond noting: "plaintiffs' expert had had zoning maps for 10 months before he made his submission in opposition to . . . summary judgment," but had failed to estimate either the acreage or number of potential relocation sites (A-43). It also recognized that the State Court of Appeals noted the extent of the discovery provided with the record in this facial challenge totalling more than 10,000 pages (A-43).

comparing *Renton*, 475 U.S. at 49-50 with *Stringfellow's*, 91 N.Y.2d at 396-97, 399-400, 402; *see* A54-55, 62-63).

Thereafter, noting that plaintiffs had repeatedly asserted in earlier stages that the New York courts applied more favorable standards to free speech claims than federal courts, the Circuit soundly rejected as "mistaken" and "unavailing" their new arguments that federal courts required greater proof as to the substantiality of the governmental interests and the availability of reasonable alternative avenues of communication (A-11-15). As to reasonable alternative avenues, the Circuit quoted at length the New York Court of Appeals' *Stringfellow's* decision applying the *Renton* standard (A-15-16, A-62-63). Thus, *Stringfellow's* held that, *inter alia*, as set forth in *Renton*, land "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space . . ." is to be considered available, and also that land already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not automatically to be considered unavailable (A-15, A-62; *ante*, pp. 14-15).

The Circuit stressed that two federal cases that plaintiffs most heavily relied on, *Topanga*, *supra*, and *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-25 (5th Cir.), *cert. denied*, 516 U.S. 988 (1995), were cited by the New York Court of Appeals (A-16-17). It rejected their further argument that there was a "serious analytic gap" between the evidence and the federal standards, expressly rejecting the far-reaching argument that federal law requires municipalities "to identify the *specific* physically and legally available relocation sites" and noting the lack of any case support for that proposition (A-17-18, italics in original). Because the Court of Appeals held that the City had to demonstrate proof of sufficient available alternative sites, the Circuit held that "to second-guess that

court's determination of this issue would violate the full faith and credit statute" (A-18).

The Circuit then reviewed the New York Court of Appeals' discussion of the City's evidence, including, *inter alia*, that 4% of unencumbered land and over 500 potential sites remain available, which encompasses a "wide mix of commercial, retail, entertainment and manufacturing uses," and the evidence of transportation accessibility (A-18). The Circuit stressed that the Court had amply considered plaintiffs' evidence, but had found it insufficient to raise material questions of fact (A-19). This was particularly because McLaughlin's analysis excluded areas that should have been included under *Renton*, such as industrial and warehouse areas and undeveloped land; even if some sites were "pragmatically" unavailable, plaintiffs did not adequately counter the evidence of enough land to cover the existent establishments where that evidence showed over 500 sites, approximately three times the existent number (A-19-20).

In sum, the Circuit held (A-21):

> "The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment --based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under *Renton*, and the persuasiveness of the City's own evidence-- does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of alternative sites in federal court."

Furthermore, the Circuit held, "substantially for the reasons stated by Judge Cedarbaum," that plaintiffs did not meet their burden of proving that they were denied a full and fair opportunity to litigate their claims in State court (A-22). So too, the Circuit rejected their reliance on their *England* reservation as misplaced, given that *England* focussed on the problem of depriving a litigant who has "invoked" federal court jurisdiction from being deprived of that choice '"without his consent and through no fault of his own"'(A-23-27). It stressed that in subsequent case law, particularly *Allen*, this Court characterized *England* as applying "[w]here a plaintiff properly *invokes federal-court jurisdiction in the first instance* on a federal claim" (A-23, emphasis in original).

In contrast, here, plaintiffs did not invoke federal court jurisdiction in the first instance, but rather, following removal, vigorously fought to remand all their claims to State court and, only after the abstention order, filed an *England* reservation (A-24-25). The Circuit also agreed with those courts which have held, in light of *England*'s language and the *Allen/Migra* precedent, that *England* applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants who voluntarily chose to file in state court (A-25-26). Finally, the Circuit rejected plaintiffs' various other arguments opposing issue preclusion, and, therefore, vacated the stay and allowed "enforce[ment] forthwith" (A-27-29).[14]

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[14] On July 9 and 13, 1998, the Circuit denied the petitions for rehearing, with *en banc* suggestions; on July 22, 1998, it denied the *Amsterdam* petitioners' motion for a stay and issued the mandate (A-1-2, 1-3a). Following Justice Ginsburg's July 22, 1998 denial of their stay application, on July 28, 1998, this Court held that their further ". . . application for [a] stay addressed to Justice Souter and referred to the Court is denied." *Amsterdam Video v. City of New York*, 119 S. Ct. 4 (1998).

REASONS FOR DENYING THE WRIT

THE PETITIONS SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S DECISION IS CORRECT UNDER THE FULL FAITH AND CREDIT STATUTE. THE APPLICATION OF ISSUE PRECLUSION WAS PROPER AND THE ADULT USE ZONING ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT.

Upon review of the Second Circuit's opinion (A-3-32) and the other relevant opinions, petitioners do not raise any legal issue deserving review. Thus, the petitions should be denied.

The *Amsterdam* petitioners lead their argument with several off-base "jurisdictional" arguments. Their initial criticism is that the Circuit failed to discuss the jurisdictional consequences of the underlying abstention order under *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941) ("*Pullman*") and that there was a "blind application of the federal collateral estoppel doctrine" (*Amst.* Pet. at 15, 16-20).

These arguments are baseless. They demonstrate a fundamental misunderstanding of the full faith and credit statute and the importance of well-settled preclusion principles. As the comprehensive opinions show, upon review of the record, the Circuit carefully adhered to the governing legal preclusion principles consistently set forth by this Court. Indeed, the argument on the alleged effects of the *Pullman* order was not even presented to the Circuit or District Court.

In the instant case, the federal courts did not decline to exercise jurisdiction over the federal claims when, following the State court resolution of the state claims, petitioners returned to federal court. Rather, the federal courts exercised

their jurisdiction, but, upon review, determined that the claims could not be relitigated under the well-settled doctrine of issue preclusion or collateral estoppel.

Moreover, contrary to their suggestions, the State courts did not impermissibly exercise jurisdiction to resolve the federal claims (*Amst*. Pet. at 17), but rather exercised their indisputably valid jurisdiction to resolve the State claims. However, under the doctrine of issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("*Allen*").

Here, the New York State courts, including its highest Court, determined issues of fact and law necessary to resolve the free expression claim under the State Constitution, which paralleled the First Amendment claim. In so doing, the courts employed the legal standards set forth in *Renton* for determining the facial validity of an adult use zoning ordinance. On the ample record, the State courts found that defendants demonstrated that it is content-neutral, narrowly tailored to serve important governmental interests, and provides reasonable alternative means of communication.

Under the full faith and credit statute, 28 U.S.C. § 1738, which implements the full faith and credit clause, U.S. Const., Art. IV, § 1, federal courts must give the same preclusive effect to state court judgments as other courts within that state. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). Accordingly, issues that were litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the state courts where judgment was rendered. *Allen*, 449 U.S. at 97-98;

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 82-84 (1984) ("*Migra*"). The statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. *Id.* at 84; *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) (reviewing history of full faith and credit clause and stressing that "regarding judgments, . . . the full faith and credit obligation is exacting . . . for claim and issue preclusion . . . purposes . . . the judgment of the rendering State gains nationwide force"); *see also Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996).

As the Circuit recognized (A-10), the statute, with the related preclusion doctrines, promotes finality of judgments and "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 94-96; *Migra*, 465 U.S. at 84. "Such repose is justified on the sound . . . principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Federal Sv. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

Despite their convoluted arguments, this case does not raise broad issues of notice or prejudice as to a party's ability to litigate their federal claims in federal court following a *Pullman* order or pursuant to an *England* reservation (*Amst.* Pet. at 18-19, 21-22; *Hick.* Pet. at 26). Petitioners vigorously fought to litigate their claims in State court, and then fully litigated their claims there, represented by experienced, competent counsel, knowing that the three-prong *Islip* and *Renton* tests were substantially the same. Their pitch that this Court should clarify the meaning of "full and fair opportunity" to litigate First Amendment issues (*Amst.* Pet. at 18-19) is

misguided. Indeed, this Court has found that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer*, 456 U.S. at 483. The District and Circuit's holdings on this issue were proper under ample case law (A-22; A-41-44).

Furthermore, cases subsequent to *England* have refused to treat that case as a broad exception to the preclusion doctrines of res judicata and collateral estoppel. In *Allen*, this Court made clear that issue preclusion is generally applicable in federal actions pursuant to 42 U.S.C § 1983. *Id.*, 449 U.S. at 95-96. This Court went on to indicate that the *England* rule is designed, not to allow the relitigation of issues already decided, but to preserve federal court jurisdiction over issues of federal law. *Id.* at 101 & n.17; *see Migra*, 465 U.S. at 84-85. Tellingly, petitioners' briefs do not acknowledge these important principles. *See also Dodd v. Hood River Co.*, 136 F.3d 1219, 1227 (9th Cir.), *cert. denied*, 142 L.Ed.2d 229 (1998) (previous *England* reservation does not "does not enable [parties] to avoid preclusion of issues actually litigated in the state forum").[15]

Moreover, contrary to their assertions (*Amst.* Pet. at 21), *Instructional Sys. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995), supports the application of issue preclusion here. The Third Circuit

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[15] As the Circuit noted (A-23), in *Allen*, 449 U.S. at 101 n.17, this Court stated: "The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction." *See* 17A. Wright, Miller, Cooper, *Fed. Prac. & Proc.*, § 4243, at 6 (1998 Pocket Part) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court.") *and* cases cited by Circuit at A-25-26.

reviewed *England* and expressly found that "the New Jersey courts were entitled to resolve the state law issues presented in the context of the declaratory judgment suit . . . and we are bound to accept their answer . . . as well as the factual and legal findings necessary to that answer." *Id.* at 823.

Petitioners also erroneously argue about the purportedly limited scope of any eventual review by this Court (*Amst.* Pet. at 20-21). Their extreme argument on this point would bar any application of issue preclusion based on state court litigation in any context, an absurd result. Furthermore, the Circuit correctly noted that this Court would be able to review the District and Circuit Court's determinations of federal law: "namely, that the issues decided and the standards applied by the New York state courts are the same as those that would be dispositive under the First Amendment" (A-29).

Revealingly, the *Amsterdam* petitioners suggest that the use of collateral estoppel has precluded them from arguing that the standard set in *Renton* should be changed or reconsidered, especially vis-a-vis the City (*Amst.* Pet. at 23-26). That same overreaching argument could be made in any case where collateral estoppel is applied and a party is unhappy with the result in the court where the issue was fully and fairly litigated. That does not, however, preclude the application of either claim or issue preclusion, which, as discussed above, has been codified by Congress and serves important policies respecting the comity of the state and federal courts (*ante*, pp. 24-25).

The *Hickerson* petition argues that the Circuit erred or "misconstrued" the decisions in *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opin.) ("*Young*"), and that its ruling conflicts with the Ninth and Fifth Circuits' decisions in *Topanga* and *Woodall* (*Hick.* Pet. at 18-

24). These arguments fail. As our thorough review of the relevant opinions shows, the controlling principles of *Renton* were correctly followed by the Circuit and the New York Court of Appeals, which also harmonized the *Renton* precedent with various subsequent decisions, including *Topanga* and *Woodall* (*ante*, pp. 14-15) . Clearly, petitioners do not like the principle that adult businesses, as any other, must compete in the business marketplace, but that is the law. So too, they do not like the fact that a range of land "in all stages of development from raw land to developed, industrial, warehouse office and shopping space" are permissible areas and part of the relevant marketplace, but that, too, is the law. *Renton*, 475 U.S. at 54-55.[16]

Petitioners raise a few other meritless arguments as to why issue preclusion should not have been applied. Reliance on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), as requiring an independent examination of the record in First Amendment cases (*Amst.* Pet. at 22; *Hick.* Pet. at 17, n.15), is misplaced. As the Circuit held, that case ". . . only concerns the proper level of *appellate* review, and

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[16] Notwithstanding that this Court does not to review factual issues, *post*, p. 30, petitioners argue that ". . . the relocation areas designated by the City in the state court proceedings cannot be considered reasonable by any standard" (*Amst.* Pet. at 25). That argument ignores the City's substantial evidence as to the commercial vitality and accessibility of the permissible areas and is at odds with *Renton* and its progeny (A-19). The persistent argument that there are "unique facts" because the City is "composed of five quite different boroughs" (*id.* at 23), has been consistently rejected (*see* A-18, n.5: Circuit states that the accessibility of potential sites in so-called "outer boroughs disposes of [the] argument, --which in any event, is without foundation and unsupported by case law-- that in contrast to the state courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis;" *see also* 113a).

does not bar the application of collateral estoppel" (A-27-28, italics in original). *See also Ferris v. Cuevas*, 118 F.3d 122, 125 & n.3 (2d Cir. 1997) (*Bose* standard inapplicable where the District Court's holding is procedurally-based on principles governing preclusion); *cf. Renton*, 475 U.S. at 53 n.3.

Furthermore, the alleged change in facts as to a statement made by Mayor Giuliani at a press conference following the New York Court of Appeals' decision, that the ordinance would severely limit the places adult establishments could relocate, does not meet the standard in *Montana v. United States*, 440 U.S. 147, 157 (1979) (*Hick.* Pet. at 24-25). As the Circuit recognized, *Montana* requires a significant change to the overall complexion of the record and the post-enactment press statement, "particularly when compared to the extensive legislative record compiled by the City[,]" does not meet that standard (A-28).

Finally, petitioners' presentations of the record and opinions are one-sided. At bottom, they attempt to argue factual or evidentiary issues which this Court does not sit to review. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). Further, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

For example, despite the extensive State Court findings and their prior admissions, set forth above, the *Amsterdam* petitioners wrongly state: "No judicial findings of fact were

ever made" (*Amst.* Pet. at 9 ¶12). So too, the claimed inadequacy of the state proceedings (*Hick.* Pet. at 27-28) is belied by a review of the full record and this Court has consistently recognized the validity of the summary judgment process. *See, e.g., Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The allegations based on press accounts of the purported effects of the enforcement process (*Amst.* Pet. at 26-27; *Hick.* Pet. at 4) are outside the record and irrelevant.

As a final matter, an alternate ground supports the denial of the writ. On the merits, based on the controlling principles in *Renton* and *Young*, the denial of a preliminary injunction was proper because the adult use zoning ordinance is facially valid under the First Amendment.

Accordingly, based on all the above, the application of issue preclusion was proper under the full faith and credit statute and the adult use zoning ordinance does not violate the First Amendment.

CONCLUSION

THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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OPPOSITION

BRIEF

98-569 (3)
No. 98-574 (3)

DEC 3 1998

CLERK

IN THE

Supreme Court of the United States

October Term, 1998

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, AND ELLIOT STAMLER,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT AND CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

(Caption Continues on Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT-INTERVENOR TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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December 2, 1998

18 pp

(Caption Continued From Front Cover)

AMSTERDAM VIDEO, INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT
AND CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

This is to certify that respondent-intervenor Times Square Business Improvement District has no corporate parents or non-wholly owned subsidiaries.

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Respondent-Intervenor Times Square Business Improvement District requests that the Court deny the petition for a writ of *certiorari* seeking review of an opinion of the Court of Appeals for the Second Circuit reported at 146 F.3d 99 (2d Cir. 1998).

SUMMARY OF THE ARGUMENT

No matter how petitioners clamor for a second bite at the apple, the fact is that the Second Circuit correctly resolved petitioners' First Amendment claim under the doctrine of collateral estoppel. Because the federal and state standards at issue are exactly the same, the unanimous decisions of the state courts to uphold the City's zoning ordinance were based on an inquiry into the *identical factual issues* pertinent to the federal Constitutionality of the Resolution: *i.e.*, the City's intent in enacting its zoning ordinance and the sufficiency of available locations for relocation. The failure of petitioners to produce evidence on these factual issues in state court doomed their First Amendment claim.

Petitioners, who avidly sought to litigate in state court, are not entitled to waste judicial resources and conduct repetitive litigation by abusing the reservation procedure set forth in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). An *England* reservation is intended to benefit parties *forced* into state court, not those who vigorously sought to have the state courts litigate all their claims. Moreover, *England* applies to *claim* preclusion, and does not bar the effect of collateral estoppel with respect to factual issues decided in the state court. Thus, *England* has no bearing on petitioners' ability to re-litigate issues already resolved in the earlier proceedings.

Finally, the Constitutionality of New York's zoning Resolution is unambiguous. Sixteen judges, sitting in five different courts, have agreed that the Resolution is aimed at negative secondary effects rather than content, and that it provides petitioners with alternative avenues of communication

that amply satisfy the requirements of the First Amendment. Because the zoning ordinance falls safely within the Constitutional parameters explicated by this Court, this Court need not expend its limited resources to examine what was, in essence, a straightforward application of this Court's First Amendment doctrine as set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

REASONS FOR DENYING THE WRIT

THE SECOND CIRCUIT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL.

A. A purported *England* reservation does not preclude the application of collateral estoppel on these facts.

Petitioners seek to frustrate the application of collateral estoppel by means of their purported *England* reservation. However, as this Court made clear in *England*, an *England* reservation is intended to protect parties *forced* to litigate in state court. *See England*, 275 U.S. at 415 ("[T]here are fundamental objections to any conclusion that a litigant *who has properly invoked the jurisdiction of a Federal District Court* to consider federal constitutional claims can be compelled, *without his consent and through no fault of his own*, to accept instead a state court's determination of those claims.") (emphasis added). Here, by contrast, petitioners unreservedly submitted both state and federal claims to the courts of New York State in the first instance, and vigorously fought to keep all their claims in that forum. *Cf. Migra v. Warren City Sch. District Bd.*, 465 U.S. 75, 85 n. 7 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) (*England* applies where a party "invokes federal-court jurisdiction *in the first instance* on a federal claim") (emphasis added); *England*, 375 U.S. at 421 (stressing that, in abstention context, a party's *choice* of federal forum must be protected).

That a reservation of federal claims pursuant to *England* exists only for the benefit of parties forced to litigate claims in state court against their will is the unanimous view of the Courts of Appeals.[1] *See, e.g., Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1304-6 (11th Cir. 1992); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 311-12 (1st Cir. 1986); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979) ("Appellants from the early days of their dispute with the City have sought to have their federal claims heard in a federal court.").

Here, by contrast, it was clear from the beginning that petitioners hoped that the state constitution would prove more helpful to them than the First Amendment as applied by this Court:

> That is why petitioners filed 13 state law claims in state court, with a sole federal claim that they themselves described as an "adjunct" to their state causes of action. *See, e.g.*, Brief of Amsterdam Video in Support of Motion to Remand at 28 ("[I]n our case, not only is the federal claim an adjunct to the state claims, but it is factual (*sic*) intertwined with the state charges"); Beth Haroules (for the Hickerson petitioners), Transcript of Oral Argument on Motion to Remand, at 7 ("Your honor, the federal claim is asserted as an adjunct to the state constitution.").

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[1] Certain of the federal courts of appeals consider the fact that a party filed first in state court to be dispositive, *see, e.g., Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988), while others evaluate the totality of the evidence that a party was "forced" to litigate in the state court and the extent to which the litigant submitted to state court jurisdiction. *See, e.g., United Parcel Svc. v. California Public Utils.*, 77 F.3d 1178, 1186 (9th Cir. 1996). Not one appellate court, however, has intimated — nor could any, in light of *England*'s emphasis on protecting a party's *choice* of forum — that a party may proceed to federal court *regardless* of its intent to litigate the same claims in an earlier state proceeding.

That is why petitioners fought so vigorously to remain in state court when confronted with respondents' notice of removal to federal court.

That is why, in stark contrast to the position they take before this Court, petitioners assured the federal district court that: "No credible claim can be made that a federal court is in a better position than the New York State court to inquire into the adequacy and suitability of [the alternative] sites." Brief of Amsterdam Video in Support of Motion to Remand at 20.

That is why petitioners filed the affidavit of their expert, Robert McLaughlin, knowing full well that (as the state court found) it incorporated "the same methodology" that this Court had "specifically rejected" in *Renton. Stringfellow's v. City of New York*, 653 N.Y.S. 2d 803, 810 (N.Y. Sup. Ct. 1996) (*"Stringfellow's I"*).

Thus, petitioners can in no sense be said to have been *forced* to litigate in state court. To the contrary, petitioners filed all their claims in state court. Removal was effected only over their vehement protest and followed by a motion to remand in which petitioners proclaimed the adequacy of the state court to determine all their claims. *See Hickerson v. City of New York*, 932 F. Supp. 550, 556 (S.D.N.Y. 1996) (*"Hickerson I"*) ("[P]laintiffs' state claims are remanded . . . Plaintiffs, however, want more. They seek to have their federal constitutional claims decided by a state court.").

Moreover, even if it were applicable here, *England* only operates to preserve *claims* a party wishes to bring to the attention of the federal court, rather than *issues* that were necessarily resolved by the State court. *England* does not abrogate the requirement that federal courts rely on the resolution of issues resolved in an earlier proceeding. *See, e.g., Wicker v. Bd. of Educ. of Knott County*, 826 F.2d 442, 448-49 (6th Cir.1987) ("Even though [plaintiff] reserved his federal claims in state court, there still can be issue preclusive effect

accorded to both state court findings of law and findings of fact."); *Bradley*, 913 F.2d 1064 at 1073 ("As the Court recognized in *England*, even a litigant who has made a valid reservation may not relitigate an issue he/she unreservedly litigated in state court."). *See also* Restatement (Second) of Judgments § 86, cmt. f, illus. 7 (1982) (stating that factual issue litigated in state court may not be relitigated, although federal claims may have been reserved). Thus, even if petitioners had not vehemently insisted on litigating in state court — as they did — *England* would have no bearing on the final resolution of factual issues relevant to petitioners' federal claim.

B. Because the federal and state standards are the same, the Second Circuit properly applied collateral estoppel with regard to issues decided by the state court.

Given that *England* has no place here, the Second Circuit was correct to make its straightforward decision that petitioners' inability to withstand summary judgment in the state courts signaled a similarly fatal dearth of evidence with respect to petitioners' federal claim. Collateral estoppel is routinely applied by the federal courts where, as here, a prior decision was based on the same standards applicable to a later proceeding. *See Allen*, 449 U.S. at 94 (stating that federal courts traditionally have followed rules of issue preclusion and *res judicata*). As the Second Circuit rightly concluded, the courts of New York state have incorporated the federal free speech standard into state law. *See, e.g., Stringfellow's v. City of New York*, 694 N.E.2d 407, 415 (N.Y. Ct. App. 1998) (*"Stringfellow's II"*) (reviewing *Renton* and other federal precedents and extensively citing federal cases as well as parallel state opinions in support of ruling under state law).

Comparing the law of the two jurisdictions indeed reveals that the standards are identical. The New York state and federal free speech standards both subject a zoning regulation to the *same* two inquiries. First, the ordinance must be justified

by a purpose unrelated to content; specifically, the desire to combat negative secondary effects associated with adult establishments. *See, e.g., Renton*, 475 U.S. at 48 (stating that relevant question is whether the "predominant intent" of zoning law is "unrelated to the suppression of free expression"); *Stringfellow's II*, 694 N.E.2d at 415 (inquiry is whether ordinance is "purposefully directed at controlling the content of the message conveyed through adult businesses" rather than "aimed at an entirely separate societal goal"). Second, adult uses must be left with a reasonable opportunity to exist in the marketplace. *See, e.g., Renton*, 475 U.S. at 50 (ordinance must allow for "reasonable alternative avenues of communication"); *Stringfellow's II*, 694 N.E.2d at 418 (explaining that, under state law, ordinance must be "no broader than necessary" in that it "assure[s] reasonable avenues of communication," and that "ample space" must remain for adult uses).[2]

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[2] In a dramatic reversal of their position throughout the state court litigation, petitioners argue that the federal courts "require a more rigorous examination of alternative locations" than that deemed sufficient by the state courts. *See, e.g.*, Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14. In fact, no federal court has required a showing of specific sites for relocation, as petitioners contend. Indeed, it would be impracticable to require cities to designate specific sites for relocation: since most zoning ordinances impose a distance requirement between adult businesses, where one adult business may locate depends in part on where another adult business has located.

Despite petitioners' criticism of New York City's evidence as overly "abstract," the City's designation of land in fact is indistinguishable from the assessment conducted by many of the federal courts cited favorably by petitioners. *See, e.g., Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995) ("[T]he collection of specific sites suggested by the City was but one possible arrangement of adult business locations that could coexist under the . . . Ordinance. . . . [V]irtually every site could be shifted to some nearby location without significantly upsetting other sites or reducing the total number of sites available."); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) ("Nothing in the instant record permits us to say that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure. . . . Thus, although the record does not

In the state court proceedings, petitioners failed entirely to raise any genuine, material issue of fact regarding the ability of New York's zoning Resolution to satisfy the two-prong standard set forth above. Put simply, petitioners cast doubt on neither the City's purpose nor the availability of alternate locations. As the district court noted, the virtually unrebutted evidence produced by New York City supported the following conclusions: (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Resolution is no broader than necessary to prevent those adverse effects; and (4) the City "more than sufficiently demonstrated" that the permissible areas for adult establishments remaining in the City are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. *See Hickerson I,* 997 F. Supp. 418 at 423 (citing *Stringfellow's I,* 653 N.Y.S.2d at 803, 808, 809, 814).

In light of petitioners' inability to create doubt as to either of the two relevant prongs, the doctrine of collateral estoppel — as well as ineluctable logic — required the Second Circuit to reject the efforts of petitioners to relitigate the precise same issues that had been decided in the state courts.

Petitioners attempt to characterize the application of collateral estoppel in this case as an abdication of duty by the federal courts. The truth is just the opposite. This Court has clearly stated that federal courts *must* give estoppel effect to issues and claims resolved in the state courts. *See Migra,* 465

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permit us to say with precision how many additional sites exist, a substantial number do."); *Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988) ([T]he district court made no findings with respect to the actual number of potential sites available . . . . However, that deficiency does not hinder us because we can roughly estimate the number of available sites . . . .").

U.S. at 84; *Allen*, 449 U.S. at 95-96. Not only does the doctrine of collateral estoppel conserve judicial resources, "but [it] also . . . promotes the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96. The decision of the Second Circuit to hold petitioners to issues as litigated in the state courts served the interests of federalism as well as judicial economy and common sense.

THIS COURT SHOULD NOT OVERTURN, NOR NEED IT REVISIT, RENTON.

Since *Renton* was decided only a little over than a decade ago, the lower courts have relied on its clear precepts to evaluate the constitutionality of dozens of municipal ordinances. The instant case is well within the mainstream of these cases, and there is no reason to revisit *Renton,* let alone overturn it.[3] Under *Renton*, as well as the identical state standard, the zoning ordinance at issue unquestionably is Constitutional.

Unlike ordinances that test the limits of Constitutional regulation, New York City's Resolution is well within the standards set by this Court; indeed, it leaves space to

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[3] Petitioners urge this Court to intervene by claiming a "conflict" between the Second Circuit and two opinions of the Fifth and Ninth Circuit courts of appeals. *See, e.g.,* Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14 (citing *Topanga Press v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995)). Such a conflict is belied, most obviously, by the fact that every court that has ruled on the Resolution thus far — including the Second Circuit — has cited these two cases in its discussion of the First Amendment without perceiving any conflict with other circuits or shortcoming on the part of the ordinance. Moreover, to the extent that these cases do purport to exclude land that is physically or practically unavailable — *e.g.,* underwater or allocated for airport use — New York City's 4 % figure represents land available *after* the exclusion of properties unlikely ever to become available for commercial use from its initial figure of 11%. *See Stringfellow's II*, 694 N.E. 2d at 419.

accommodate far more than the number of establishments that may seek to relocate. As the Second Circuit noted, New York City offered evidence that, *"after excluding land identified by the City as being unlikely to be developed for commercial use,* 4 % of the total land area of the City remained open to adult establishments . . . [A]fter factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available." *See Hickerson v. City of New York*, 146 F.3d 99, 1078 (2d Cir. 1998) (*"Hickerson II"*) (emphasis added) (citing *Stringfellow's II*, 694 N.E.2d 407 at 418). The Second Circuit recognized that the ordinance leaves no shortage of alternative avenues of communication, given that "this land could accommodate . . . approximately *three times* the number of establishments that currently exist." *Id.* at 109. In agreement with the district court and each of the state courts, the Second Circuit accepted the City's evidence that all the areas in Manhattan zoned for adult use and 80% of the land in other boroughs are within a 10-minute walk from a subway line or major bus route.

In lieu of presenting this Court with reasons to overturn a carefully considered ruling of recent vintage, petitioners here simply have tried to relitigate matters flatly disposed of by *Renton*. The essence of their petition to this Court is not, as they claim, that any conflict or departure from judicial norms necessitates resolution by this Court. Rather, it is that petitioners seek to overturn *Renton* itself.[4]

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[4] Ironically, in light of their attack on *Renton*, petitioners argue that they have been estopped from urging the reconsideration of federal free speech standards. In fact, petitioners lobbied for a modification of the First Amendment standards set forth by this Court before both the district court and the Second Circuit, pressing the novel argument that *Renton* requires cities to identify specific sites, and asking the Second Circuit to conduct an unprecedented borough-by-borough analysis of the ordinance. The current posture of this case itself is the clearest evidence that, far from being forced to subsist under an unreviewable decision of the state court, petitioners remain free to urge their interpretations of *Renton* and its progeny upon this Court, as they unsuccessfully did in three state courts, the district court and

That petitioners seek to overturn *Renton* is evident in that their interpretation of governing law is the same as that of the Ninth Circuit in *Renton* itself. But this Court *reversed* the decision of the Ninth Circuit, which had struck down the city of Renton's ordinance in part because the 520 acres of available land included a sewage plant, a horse racing track, a business park containing only buildings suitable for industrial use, a warehouse, an oil tank farm, and a fully-developed shopping center.[5] In *reversing* that decision, this Court commented that the land available included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space . . . ." Here, in direct contravention of *Renton*'s teaching, and instead in accordance with the methodology rejected in *Renton*, petitioners' expert excluded land that is industrially zoned, zoned for warehouses, currently used as a parking or storage lot, subject to a long-term lease, currently housing hazardous waste, or requires a permit to change its zoning classification.

Ignoring for the moment the fact that petitioners' strategy is in derogation of the rulings of countless lower courts, it also is in blatant disregard of *Renton*'s clear mandate that the fact that adult establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54. At bottom, all of petitioners' mischaracterizations of governing law and attempts to exclude viable relocation sites on the basis of factors deemed impermissible by this Court amount to one thing: an end run around *Renton*. That is why they have attempted to force a strained, impracticable standard for assessing alternative

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the Second Circuit.

[5] *Cf.* Petition of the Hickerson Plaintiffs For Writ of *Certiorari* at 8 (criticizing relocation sites offered by the City including "Manhattan's Flower District . . . the Rockefeller Center Complex . . . Bronx Terminal Market, Hunts Point Sewage Treatment Plant," *etc.*).

locations on every court that has rejected their claims. That is why they fought so hard to litigate in state court in hopes that they might evade *Renton* altogether.

Petitioners do not seek the protection afforded by the First Amendment. Rather, they seek protection that exceeds the protection afforded to all other businesses subject to zoning: to wit, specific retail locations guaranteed to be immediately available, desirable, and economically viable. This Court should not indulge that demand at the expense of its own precedent, the law of the circuits, and the "high respect" to which a city's attempt to preserve the quality of urban life is due. *Renton*, 475 U.S. at 50 (citing *Young v. American Mini-Theatres*, 427 U.S. 50, 71 (1976)).

CONCLUSION

For the reasons stated above, the petitions for a writ of *certiorari* to review the decision of the Second Circuit should be denied.

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Respectfully submitted,

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